167-116

TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1893.

No. ~~239~~ 444.

DAVID F. CAMPBELL, PLAINTIFF IN ERROR,

vs.

ALFRED S. ELLET, BY JOHN A. ELLET, HIS GUARDIAN.

IN ERROR TO THE SUPREME COURT OF THE STATE OF COLORADO.

FILED OCTOBER 9, 1893.

(15,420.)

(15,420.)

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1895.

No. 283.

DAVID F. CAMPBELL, PLAINTIFF IN ERROR,

vs.

ALFRED S. ELLET, BY JOHN A. ELLET, HIS GUARDIAN.

IN ERROR TO THE SUPREME COURT OF THE STATE OF COLORADO.

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JUDD & DETWEILER, PRINTERS, WASHINGTON, D. C., FEBRUARY 18, 1896.

Return.

THE UNITED STATES OF AMERICA, }
State of Colorado, } *ss:*

In obedience to the command of the within writ, I herewith transmit to the honorable Supreme Court of the United States a duly certified transcript of the record and proceedings in the within-entitled case, together with all things concerning the same.

Witness my hand and the seal of said supreme court, at Denver, in said State, this 14th day of August, 1893.

[Seal Supreme Court, State of Colorado.]

JAMES A. MILLER, *Clerk,*
By —— ——, *Deputy Clerk.*

3 *Citation, U. S. — Court.*

[Vignette.]

THE UNITED STATES OF AMERICA, }
District of Colorado. }

The United States of America to Alfred S. Ellet, by John A. Ellet, his guardian, Greeting:

You are hereby cited and admonished to be and appear at the Supreme Court of the United States, to be holden at Washington, D. C., on the ninth (9th) day of October next, pursuant to a writ of error filed in the clerk's office of the supreme court of the State of Colorado, wherein David F. Campbell is plaintiff in error and you are defendant in error, to show cause, if any there be, why the judgment rendered against the said plaintiff in error, as in the said writ of error mentioned, should not be corrected and why speedy justice should not be done to the parties in that behalf.

Witness the Honorable Charles D. Hayt, judge of the supreme court of the State of Colorado, this 14th day of August, in the year of our Lord one thousand eight hundred and ninety-three.

CHARLES D. HAYT,
Chief Justice of the Supreme Court of the State of Colorado.

4 [Endorsed:] Gen. No., —. — court of the United States, district of Colorado. D. F. Campbell, plaintiff in error, *vs.* Alfred S. Ellet, defendant in error. Citation. Filed in — court of the U. S. this — day of ——, A. D. 18— —— ——, clerk, by —— ——, deputy clerk. —— ——, attorney for plaintiff in error.

Proof of Service.

THE UNITED STATES OF AMERICA, *District of Colorado,* } ss:

On this 14th day of August, A. D. 1893, I, Platt Rogers, attorney for Alfred S. Ellet, received a copy of the within citation at Denver, Arapahoe county, Colorado, from the hands of L. C. Rockwell.

PLATT ROGERS,
Att'y for A. S. Ellet.

5 STATE OF COLORADO:

In the Supreme Court Thereof.

ALFRED S. ELLET, by JOHN A. ELLET, His Guardian, Appellant,
vs.
DAVID F. CAMPBELL, Appellee.

Your petitioner, David F. Campbell, respectfully represents:

First. That he is the defendant and appellee in the above-entitled action; that the complaint in this cause was filed June 25th, 1888, in the district court of Boulder county, State of Colorado; that an answer was filed thereto September 13th, 1888, and a replication filed to said answer on September 4th, 1889, and the cause was submitted to the court for trial without the intervention of a jury upon said day upon an agreed state of facts, signed by counsel for the respective parties, and upon the 13th day of September, 1890, the said district court of Boulder county decided said cause in favor of the defendant below and gave judgment accordingly, deciding and adjudging that defendant below had the better right to the ground in dispute and was entitled to receive a patent from the Government in pursuance of said application therefor.

6

Second. That the object and purpose of the action was to make good an adverse claim filed by appellee against appellant's application for a patent for the J. L. Sanderson lode, situate in Gold Hill mining district, Boulder county, State of Colorado; that the whole controversy depends upon the construction of certain statutes of the United States—that is to say, sections 2319, 2320, 2322, 2323, 2325, and 2326 of the Revised Statutes of the United States, and the amendment of March 3rd, 1881, to section 2326 of said Revised Statutes—and a Federal question was raised by each party because each party claimed under an authority exercised under a statute of the United States, and whatever right, title, or privilege the respective parties have or claim to the ground in dispute is based upon the above-quoted sections of the Revised Statutes of the United States in this: that said David F. Campbell sought to obtain from the Government of the United States a patent for the J. L. Sanderson lode under section 2325 thereof and the amendment of March 3rd, 1881, to section 2326, and appellant, who was plaintiff below,

filed a protest or an adverse claim under section 2326 of the Revised Statutes of the United States, basing his right to adverse — under a title and a right arising under section 2323 of the Revised Statutes of the United States concerning tunnels.

7 Third. That appellant appealed from such decision, filed his bond, and on the 2nd day of January, 1891, an authenticated transcript of the record from the court below was filed in this court, and a joinder of error was filed on January the 16th, 1892, and upon the — day of June, 1893, a decision was rendered by this court reversing said judgment in all things and directing the said district court in and for Boulder county to enter judgment in favor of appellee in accordance with the opinion of this court, which decided that the plaintiff below had the better right to the ground in dispute, and that defendant below was not entitled to receive a patent from the Government of the United States to the said J. L. Sanderson lode.

That nothing further remains to be done in said cause except for the district court of Boulder county to enter up judgment in favor of the plaintiff below and against the defendant, as directed by this honorable court.

Wherefore your petitioner prays that a writ of error be allowed from the Supreme Court of the United States to the supreme court of the State of Colorado, pursuant to the statute in such case made and provided, and the rules and practice of the Supreme Court of the United States in respect thereto; and your petitioner will ever pray.

L. C. ROCKWELL,
Attorney for Petitioner.

8 STATE OF COLORADO, } ss:
County of Arapahoe, }

Lewis C. Rockwell, being first duly sworn, deposes and says that he is the attorney of appellee, petitioner herein, and resides in Denver, Arapahoe county; that petitioner resides in Boulder county, and is now absent from Arapahoe county, as deponent verily believes; that he has read the foregoing petition and knows the contents thereof, and that the matters and things therein set forth are true.

L. C. ROCKWELL.

Subscribed and sworn to before me this 4th day of August, A. D. 1893.

[Seal Supreme Court, State of Colorado.]

JAMES A. MILLER,
Clerk Supreme Court, Colorado.

STATE OF COLORADO:

On reading the foregoing petition it is ordered a writ of error be allowed to said court as prayed for; that the same be made a su-

persedeas on appellee's giving a bond in the sum of one thousand dollars, conditioned according to law, to be approved by me.

Witness my hand this fourth day of August, 1893.

CHARLES D. HAYT,
Chief Justice of the Supreme Court of the State of Colorado.

9 [Endorsed:] Alfred S. Ellet, by Jno. A. Ellet, his guardian, against David F. Campbell. Petition for writ of error. Filed in supreme court Aug. 4, 1893. James A. Miller, clerk.

9½ In the Supreme Court of the State of Colorado.

10 STATE OF COLORADO, } ss:
Supreme Court, }

Be it remembered that heretofore and on, to wit, the second day of January, A. D. 1891, came the appellant and filed in the office of the clerk of said supreme court a duly certified transcript of record of proceedings in a certain cause on appeal from the judgment of the district court of Boulder county, State aforesaid, wherein Alfred Ellet, by John A. Ellet, his guardian, was plaintiff and David F. Campbell was defendant, and which said transcript of record and appellant's assignment of errors thereto appended is in words and figures as follows, to wit:

11 STATE OF COLORADO, } ss:
County of Boulder, }

Pleas before the honorable district court of the eighth judicial district of the State of Colorado in and for the county of Boulder and at a term thereof begun and held at the court-house at the city of Boulder, in the county of Boulder and State of Colorado, on the first Monday, the same being the third day, of the month of February, in the year of our Lord one thousand eight hundred and ninety, and of the Independence of the United States the one hundred and thirteenth.

Present: The Honorable John Campbell, judge of the district courts of the fourth judicial district of the State of Colorado, by request of the Honorable Sylvester S. Downer, judge of the eighth judicial district of the State of Colorado, presiding; James E. Garrigues, Esquire, district attorney; Edward Autrey, Esquire, sheriff of Boulder county, and Eugene Wilder, clerk of said court.

12 Be it remembered that heretofore and on, to wit, *on* the twenty-fifth day of the month of June, in the year of our Lord one thousand eight hundred and eighty-eight, Alfred S. Ellet, by John A. Ellet, guardian, by Rogers & Shafroth, Esquires, his attorney-, filed in the office of the clerk of said court a certain complaint; which said complaint is in words and figures following—that is to say:

In the District Court of the County of Boulder, State of Colorado.

ALFRED S. ELLET, by JOHN A. ELLET, His Guardian, Plaintiff,
vs.
DAVID F. CAMPBELL, Defendant. } Complaint.

The plaintiff above named alleges:

1. That he is of the age of twelve years.

2. That on the 29th day of December, A. D. 1876, at Boulder, Colorado, the said John A. Ellet was duly appointed guardian of the person and property of said plaintiff by the county court of Boulder county, Colorado, sitting as a court of probate.

3. That on the 18th day of September, A. D. 1872, George C. Corning, Andrew J. Macky, and Daniel A. Robinson and James Carr, citizens of the United States, duly located a tunnel claim under the provisions of the acts of Congress and the laws of the Territory (now State) of Colorado relating to tunnel claims, three thousand feet in length, in Gold Hill mining district, in the county of Boulder and then Territory (now State) of Colorado, by posting a plain notice at the point of commencement of said tunnel, giving
13 the names of said locators and the proposed course and length of said tunnel, and by placing along the line thereof for three thousand feet from said point of commencement, at intervals of two hundred feet, stakes plainly marked with the name of said tunnel, and also by running a line on each side of the line of said tunnel and parallel therewith seven hundred and fifty feet distant therefrom and placing stakes thereon at intervals of two hundred feet, and by placing at the corners of said tunnel site monuments marked with the name of said tunnel, and by causing to be recorded in the office of the clerk and recorder of said Boulder county on the eighteenth day of September, 1872, a certificate of the location of said tunnel, stating therein the point of commencement and the course and length of the line thereof and the names of said locators.

4. That thereafter and before the ninth day of July, A. D. 1873, the said locators hereinbefore named established the face of said tunnel and expended in the work and labor required therefor the sum of one thousand dollars, and ran said tunnel one hundred and thirty feet from the face thereof, seven feet high and six feet wide, at an expenditure of five thousand dollars, and thereupon placed at the face of said tunnel a plain sign or notice, giving the names of the locators as the owners thereof, and a plat of said tunnel claim, giving the location and boundaries thereof and the course and distance of the line of said tunnel and the height and width of said tunnel bore.

5. That on the 9th day of July, A. D. 1873, the said locators filed and caused to be recorded in the office of the clerk and re-
14 corder of said Boulder county a certificate of the location of said tunnel, stating the point of commencement and the course and length of the line thereof as the same were respectively

stated upon the notice posted at the face of said tunnel, together with an affidavit stating the amount of work done and money expended upon said tunnel, and that it was *bona fide* their intention to prosecute the work on said tunnel for the discovery of mines and development of the same.

6. That the said locators and the several successive owners of said tunnel location have continuously and diligently prosecuted the work of running said tunnel, and have expended therein during each year since the location thereof more than one hundred dollars, and have made a total expenditure of one hundred thousand dollars, and have erected large and extensive improvements at the face of said tunnel for the convenient working of the same, of the value of one thousand dollars.

7. That on the 3rd day of February, A. D. 1875, while the Corning Tunnel Company, a corporation organized and existing under and by virtue of the laws of the then Territory (now State) of Colorado, being the owner of said tunnel by sundry mesne conveyances from the locators thereof, were prosecuting the work thereon, they cut and discovered within said tunnel and upon the line thereof at a distance of five hundred and ninety-four feet from the face thereof a vein of mineral-bearing rock in place, which they named and located as the Bonanza lode, and on said 3rd day of February they posted at the face of said tunnel a plain sign and notice giving the name of said vein, the point of discovery within said tunnel, the general course of said vein from the point of discovery, and claiming seven hundred and fifty feet of said vein on each side of the line of said tunnel.

8. That on the 9th day of February, A. D. 1875, said Corning Tunnel Company filed and caused to be recorded in the office of the clerk and recorder of the county of Boulder a location certificate of said Bonanza lode, giving the name of the lode so discovered and the name of said company as the locator thereof, the point in the line of said tunnel at which said lode was discovered, and claiming seven hundred and fifty feet of said vein upon each side thereof, together with the general course of said vein.

9. That at all times since the discovery of said Bonanza lode the owners of said claim have continuously and diligently prosecuted work on said lode and have expended each year thereon the sum of one hundred dollars.

10. That the vein so discovered in said tunnel and located as aforesaid was not, prior to said discovery, known to exist, nor did said vein appear upon the surface.

11. That the said plaintiff, a citizen of the United States, by sundry mesne conveyances became and now is the owner of said tunnel claim and of the said Bonanza lode discovered therein.

12. That the said tunnel so located is described as follows: Beginning at a nail driven in the railway track thirteen feet north 3° 30′ west from the mouth of the Corning tunnel, the same being the place of beginning of said Corning tunnel, whence the quarter-section corner in the east line of section one, town. one north, range seventy-two west, of sixth P. M., bears north 44° 44′

east three thousand five hundred and fifty-five feet; thence south 2° east three thousand feet and seven hundred and fifty feet on each side of said line, together with appurtenances.

13. That the said Bonanza lode was located and is described as follows: Beginning at a point in the Corning tunnel five hundred and ninety-four feet from the face of said tunnel and extending from said point seven hundred and fifty feet easterly and seven hundred and fifty feet westerly, the bearing of said lode is about north 78° east, situate in Gold Hill mining district, Boulder, Colorado.

14. Upon information and belief plaintiff avers that on the 10th day of July, A. D. 1886, the defendant and one Cyrus Taylor, with full knowledge of the location of said tunnel claim and of the discovery and location of said Bonanza lode, entered upon the line and within the boundaries of said tunnel location at a point about seven hundred feet from the face thereof and ran a drift or adit through the slide earth and rock a distance of about fifty feet, and then and there uncovered the top or apex of said Bonanza vein; that said drift or adit was commenced at a point where the vein of said Bonanza lode did not appear at the surface, for the pur-
17 pose of cutting said vein as indicated by its dip at the point of its discovery within said tunnel.

15. That thereafter and within the time allowed by law said defendant and said Cyrus Taylor duly located a mining claim upon said Bonanza lode, calling the same the J. L. Sanderson lode, and on the 26th day of August, A. D. 1886, filed and caused to be recorded a location certificate thereof.

16. That on the thirtieth day of March, A. D. 1888, the defendant filed his application for a United States patent for said J. L. Sanderson lode in the United States land office at Central City, Colorado, and afterwards caused notice of said application to be published as required by law, and during the period of said publication and on, to wit, the first day of June, A. D. 1888, the plaintiff filed his protest and adverse claim on behalf of said tunnel location and said Bonanza Lode location, which was duly allowed by the register and receiver of said land office.

17. That the portion of said tunnel claim and lode claim wrongfully entered upon by said defendant and located as the J. L. Sanderson lode, and for which said application for patent is made is described as follows: Beginning at corner No. 4 of said so-called J. L. Sanderson lode, the same being south 13° 39′ west 641.4 feet from the face of said Corning tunnel, thence north 73° 32′ east 901 feet to a corner; thence south 2° east 162 feet to a corner; thence south 73° 32′ west 837.5 feet to corner No. 3 of said J. L. Sanderson lode; thence north 15° 28′ west 150 feet to the place of beginning.

18 18. That this action is brought in support of said adverse claim, and that plaintiff has necessarily paid out and expended the sum of one hundred dollars for plats, abstracts, and copies of papers filed with said adverse claim and fifty dollars reasonable counsel fee for preparing said adverse claim.

Wherefore plaintiff demands judgment against the defendant for the recovery of the possession of said parcel of said tunnel claim and

Bonanza Lode claim, for the sum of one hundred dollars damages, for the sum of fifteen hundred dollars expended in support of said adverse claim, together with costs of suit and such other, further, or different relief as to the court may seem just.

ROGERS & SHAFROTH,
Att'ys for Plaintiff.

STATE OF COLORADO, }
Boulder County, } *ss:*

John A. Ellet, of lawful age, being duly sworn, on his oath deposes and says that he is the guardian of the plaintiff, an infant, in the above-entitled cause, and makes this verification in behalf of said plaintiff; that he has read the foregoing complaint and knows the contents thereof, and that the same is true of his own knowledge except as to the matters therein stated on information and belief, and as to those he believes it to be true.

(Signed) JOHN A. ELLET.

Subscribed and sworn to before me this 25 day of June, A. D. 1888.

[NOTARIAL SEAL.] (Signed) H. E. ROWLAND,
Notary Public.

19 (Indorsement:) 2293. In district court, county of Boulder. Alfred S. Ellet, by John A. Ellet, guardian, *vs.* David F. Campbell. Complaint. Filed in district court Jun- 25, 1888. (Signed) E. Wilder, clerk, by Edward S. Walker, deputy. Rogers & Shafroth, att'ys for pl't'ff.

20 And afterwards, but on the same day, to wit, on the twenty-fifth day of the month of June, in the year of our Lord one thousand eight hundred and eighty-eight, there was issued out of the office of the clerk of said court a people's writ of summons.

(Said summons was in the usual form, was duly served by the sheriff of Boulder county or his deputy, but was never returned to the office of the clerk of this court.)

And afterwards, but on the same day, to wit, on the twenty-fifth day of the month of June, in the year of our Lord one thousand eight hundred and eighty-eight, there was issued out of the office of said clerk a notice of pendency of action; which said notice was in form as prescribed by law and was duly transmitted to the United States land office at Central City, Colorado.

And afterwards and on, to wit, *on* the fourteenth day of the month of July, in the year of our Lord one thousand eight hundred and eighty-eight, the defendant, by L. C. Rockwell, Esquire, filed in the office of the clerk of said court his demurrer to the complaint herein; which said demurrer is in words and figures as follows—that is to say:

STATE OF COLORADO, } ss:
County of Boulder, }

In the District Court.

ALFRED S. ELLET, by JOHN A. ELLET, His Guardian, Plaintiff,
vs.
DAVID F. CAMPBELL, Defendant.

21 Comes now the defendant, by L. C. Rockwell, his attorney, and demurs to the complaint filed herein, and for cause of demurrer says that the said complaint does not state facts sufficient to constitute a cause of action.

And for special cause of demurrer shows:

(*a.*) That it appears in and by said complaint that the grantors of plaintiff did not comply with the law of the State of Colorado or of Congress regarding the locating of lodes in their attempted location of the Bonanza lode.

(*b.*) It does not appear that said lode was ever staked upon the surface of the ground or the point of discovery thereof marked on the surface of the ground.

(*c.*) The complaint shows it is brought in support of an adverse claim, and the matters and things alleged in the complaint do not give this court jurisdiction to hear and determine a case of that nature.

(*d.*) It does not appear in and by said complaint that said Bonanza lode was located by any person or persons having the legal capacity to locate a mining claim.

L. C. ROCKWELL,
Att'y for Def't.

(Indorsement:) No. 2293. In district court of Boulder county. Alfred S. Ellet, plaintiff, *vs.* D. F. Campbell, defendant. Demurrer to complaint. Filed in district court Jul- 14, 1888. (Signed) E. Wilder, clerk. L. C. Rockwell, att'y for def't.

22 And afterwards and on, to wit, *on* the seventh day of the month of September, in the year of our Lord one thousand eight hundred and eighty-eight, the same being one of the regular juridical days of the September term, A. D. 1888, of said court, in the year aforesaid, the following proceedings, among others, were had in said court and were duly entered of record—that is to say:

In the Matter of ALFRED S. ELLET, by JOHN A. ELLET, Guardian,
Plaintiff,
vs.
DAVID F. CAMPBELL, Defendant.

At this day come the parties to this action, by their respective attorneys, Platt Rogers, Esquire, appearing on behalf of the plaintiff, and L. C. Rockwell, Esquire, appearing for the defendants.

And the demurrer of the defendant to the plaintiff's complaint comes on now to be heard by the court, and the court, after listen-

ing to arguments of counsel and being fully advised in the premises, doth overrule the same.

And now, upon application of counsel, the defendant is allowed five days to answer, and the plaintiff is allowed five days thereafter in which to reply.

And afterwards and on, to wit, *on* the eleventh day of the month of September, in the year of our Lord one thousand eight hundred and eighty-eight, the same being one of the regular juridi-
23 cal days of the September term, A. D. 1888, of said court, in the year aforesaid, the following proceedings, among others, were had in said court and were duly entered of record—that is to say:

In the Matter of ALFRED S. ELLET, by JOHN A. ELLET, Guardian,
Plaintiff,
vs.
DAVID F. CAMPBELL, Defendant.

At this day, by consent of counsel, the court doth order that this action be docketed for trial on the twenty-first day of September, A. D. 1888.

And afterwards and on, to wit, *on* the thirteenth day of the month of September, in the year of our Lord one thousand eight hundred and eighty-eight, there was filed in the office of the clerk of said court a certain answer; which said answer is in words and figures following—that is to say:

STATE OF COLORADO, } ss:
County of Boulder, }

In the District Court.

ALFRED S. ELLET, a Minor, by JOHN A. ELLET, His Guardian,
Plaintiff,
vs.
DAVID F. CAMPBELL, Defendant.

24 Defendant, answering the complaint, saith he admits the statements and allegations of the first, second, third, fourth, and fifth paragraphs of said complaint.

Answering the sixth paragraph of said complaint, defendant saith that as to whether or not said work has been prosecuted continuously and diligently upon said Corning tunnel, and whether or not more than $100 has been spent each year in driving said tunnel since it was located, and whether or not more than $100,000 has been spent in development work upon said tunnel, defendant has not and cannot obtain sufficient knowledge or information upon which to base a belief; that whether or not said Corning Tunnel Company has by divers or sundry mesne conveyances acquired the interests of the original locators of said tunnel, this defendant has

not and cannot obtain sufficient knowledge or information upon which to base a belief; that whether or not said company on the 3rd day of February, 1875, or at any other time struck and discovered within said tunnel a lode they named and called the Benanza, or whether or not said lode was marked at the face of said tunnel with a plain sign and notice giving the name of said vein, the point of discovery within said tunnel, and the general course of said vein, as in said seventh paragraph of said complaint is alleged, this defendant has not and cannot obtain sufficient knowledge or information upon which to base a belief.

Defendant admits the allegations of the 8th paragraph of said complaint.

25 That whether or not since the discovery of said supposed Bonanza lode $100 worth of work has been done upon the same each year, defendant has not and cannot obtain sufficient knowledge or information upon which to base a belief.

Defendant admits the allegations of the 10th paragraph of said complaint.

That whether or not plaintiff has acquired by sundry mesne conveyances or otherwise whatever title or interest the said Corning Tunnel Company had in said tunnel or the rights of the original locators therein, defendant has not and cannot obtain sufficient knowledge or information upon which to base a belief.

Defendant admits the allegations of the 12th and 13th paragraphs of said complaint.

Defendant admits the allegations of the 14th paragraph of said complaint, except he denies that by running the drift therein charge or by any work done they uncovered the top or apex of said Bonanza vein, and denies that said J. L. Sanderson lode was discovered or cut on the line of said tunnel, but, on the contrary, avers that said discovery of said J. L. Sanderson lode is 200 feet east from the line of the bore of said tunnel; denies that said Bonanza lode bears any relation to the said J. L. Sanderson lode.

Defendant admits the allegations of the 15th, 16th, 17th, and 18th paragraphs of said complaint.

Defendant, further answering said complaint, avers that neither plaintiff nor his grantors ever made a valid location of said

26 Bonanza lode, in this, that said lode was never staked upon the ground; that no stakes were placed or monuments erected at either corner or in the center of the side lines of said Bonanza claim or elsewhere upon the surface of the ground, neither was any discovery shaft sunk upon the surface of the ground nor any work done thereon; that the supposed certificate of location of said Bonanza lode was wholly void and of no effect, because it did not describe said lode with reasonable certainty; neither did it describe it with reference to any natural object or permanent monument, neither has plaintiff or his grantors at any time done any work upon the surface of the ground embraced within the side and end lines of said Bonanza lode; that the point where said J. L. Sanderson lode was cut and discovered and at the point where the discovery was made and the discovery shaft sunk was upon the un-

occupied public mineral domain of the United States, and defendant and his colocator, Taylor, had a right to discover and locate said J. L. Sanderson lode and take up the surface ground embraced within the side and end lines of said J. L. Sanderson location as public mineral lands of the United States; that in taking up and locating said J. L. Sanderson lode defendant and his colocator, Taylor, complied with the local laws and rules of miners of said mining district, the laws of the United States, and those of the State of Colorado relating to the location of lodes upon the public domain of the United States; that they marked the boundaries of
27 said J. L. Sanderson claim with six substantial posts—one at each of the four corners of the said claim and one in the center of each side line thereof, said posts being set in the ground and hewn and marked on the side in towards the claim, and when said stakes were so set the boundaries of said J. L. Sanderson claim could be easily and readily traced and the same were plainly marked upon the ground; that said defendant Campbell and his colocator, Taylor, at the time of their said discovery also marked the discovery shaft of said claim with a plain sign and notice containing the name of the lode, to wit, the J. L. Sanderson; the names of the locators, to wit, David F. Campbell and Cyrus Taylor, and the date of location, which was the 10th day of July, 1886; that afterwards and upon the 26th day of August, 1886, said Campbell and Taylor caused said J. L. Sanderson lode to be surveyed and a location certificate thereof to be duly made and recorded in the office of the clerk and recorder of Boulder county, Colorado, on the 30th day of August, 1886, in Book 87, at page 248, of the records of said Boulder county, Colorado, and the lode has constantly been worked since its discovery by defendant and those in his interest.

Wherefore defendant demands judgment:

1st. For possession of said J. L. Sanderson lode.

2nd. For his costs.

L. C. ROCKWELL,
Att'y for Def't.

28 STATE OF COLORADO, }
County of Boulder, } *ss:*

David F. Campbell, of lawful age, being first duly sworn according to law, on oath deposes and says he is the defendant in this action; that he has read the foregoing answer and knows the contents thereof, and that the same is true of his own knowledge, except as to the matters and things therein stated on information and belief, and as to those he believes it to be true.

Subscribed and sworn to before me this 11th day of September, 1888.

(Signed) J. H. THOMPSON,
Justice of the Peace.

My commission expires Jan. 10th, 1889.

not and cannot obtain sufficient knowledge or information upon which to base a belief; that whether or not said company on the 3rd day of February, 1875, or at any other time struck and discovered within said tunnel a lode they named and called the Bonanza, or whether or not said lode was marked at the face of said tunnel with a plain sign and notice giving the name of said vein, the point of discovery within said tunnel, and the general course of said vein, as in said seventh paragraph of said complaint is alleged, this defendant has not and cannot obtain sufficient knowledge or information upon which to base a belief.

Defendant admits the allegations of the 8th paragraph of said complaint.

25 That whether or not since the discovery of said supposed Bonanza lode $100 worth of work has been done upon the same each year, defendant has not and cannot obtain sufficient knowledge or information upon which to base a belief.

Defendant admits the allegations of the 10th paragraph of said complaint.

That whether or not plaintiff has acquired by sundry mesne conveyances or otherwise whatever title or interest the said Corning Tunnel Company had in said tunnel or the rights of the original locators therein, defendant has not and cannot obtain sufficient knowledge or information upon which to base a belief.

Defendant admits the allegations of the 12th and 13th paragraphs of said complaint.

Defendant admits the allegations of the 14th paragraph of said complaint, except he denies that by running the drift therein charge or by any work done they uncovered the top or apex of said Bonanza vein, and denies that said J. L. Sanderson lode was discovered or cut on the line of said tunnel, but, on the contrary, avers that said discovery of said J. L. Sanderson lode is 200 feet east from the line of the bore of said tunnel; denies that said Bonanza lode bears any relation to the said J. L. Sanderson lode.

Defendant admits the allegations of the 15th, 16th, 17th, and 18th paragraphs of said complaint.

Defendant, further answering said complaint, avers that neither plaintiff nor his grantors ever made a valid location of said

26 Bonanza lode, in this, that said lode was never staked upon the ground; that no stakes were placed or monuments erected at either corner or in the center of the side lines of said Bonanza claim or elsewhere upon the surface of the ground, neither was any discovery shaft sunk upon the surface of the ground nor any work done thereon; that the supposed certificate of location of said Bonanza lode was wholly void and of no effect, because it did not describe said lode with reasonable certainty, neither did it describe it with reference to any natural object or permanent monument, neither has plaintiff or his grantors at any time done any work upon the surface of the ground embraced within the side and end lines of said Bonanza lode; that the point where said J. L. Sanderson lode was cut and discovered and at the point where the discovery was made and the discovery shaft sunk was upon the un-

occupied public mineral domain of the United States, and defendant and his colocator, Taylor, had a right to discover and locate said J. L. Sanderson lode and take up the surface ground embraced within the side and end lines of said J. L. Sanderson location as public mineral lands of the United States; that in taking up and locating said J. L. Sanderson lode defendant and his colocator, Taylor, complied with the local laws and rules of miners of said mining district, the laws of the United States, and those of the State of Colorado relating to the location of lodes upon the public domain of the United States; that they marked the boundaries of
27 said J. L. Sanderson claim with six substantial posts—one at each of the four corners of the said claim and one in the center of each side line thereof, said posts being set in the ground and hewn and marked on the side in towards the claim, and when said stakes were so set the boundaries of said J. L. Sanderson claim could be easily and readily traced and the same were plainly marked upon the ground; that said defendant Campbell and his colocator, Taylor, at the time of their said discovery also marked the discovery shaft of said claim with a plain sign and notice containing the name of the lode, to wit, the J. L. Sanderson; the names of the locators, to wit, David F. Campbell and Cyrus Taylor, and the date of location, which was the 10th day of July, 1886; that afterwards and upon the 26th day of August, 1886, said Campbell and Taylor caused said J. L. Sanderson lode to be surveyed and a location certificate thereof to be duly made and recorded in the office of the clerk and recorder of Boulder county, Colorado, on the 30th day of August, 1886, in Book 87, at page 248, of the records of said Boulder county, Colorado, and the lode has constantly been worked since its discovery by defendant and those in his interest.

Wherefore defendant demands judgment:

1st. For possession of said J. L. Sanderson lode.

2nd. For his costs.

L. C. ROCKWELL,
Att'y for Def't.

28 STATE OF COLORADO, } ss:
County of Boulder, }

David F. Campbell, of lawful age, being first duly sworn according to law, on oath deposes and says he is the defendant in this action; that he has read the foregoing answer and knows the contents thereof, and that the same is true of his own knowledge, except as to the matters and things therein stated on information and belief, and as to those he believes it to be true.

Subscribed and sworn to before me this 11th day of September, 1888.

(Signed) J. H. THOMPSON,
Justice of the Peace.

My commission expires Jan. 10th, 1889.

(Indorsement:) No. 2293. In district court of Boulder county. Alfred S. Ellet, plaintiff, *vs.* David F. Campbell, defendant. Answer. Filed in district court Sep. 13, 1888. (Signed) E. Wilder, clerk. L. C. Rockwell, att'y for def't.

29 And afterwards and on, to wit, *on* the twentieth day of the month of September, in the year of our Lord one thousand eight hundred and eighty-eight, the same being one of the regular juridical days of the September term, A. D. 1888, of said court, the following proceedings, among others, were had therein and duly entered of record—that is to say:

In the Matter of ALFRED S. ELLET, by JOHN A. ELLET, Guardian,
Plaintiff,
vs.
DAVID F. CAMPBELL, Defendant.

At this day come the parties to this action, by their respective attorneys, and now, by consent of parties hereto, the court doth order that this action be, and the same is, continued until the next term of this court.

And afterwards and on, to wit, *on* the fourth day of the month of February, in the year of our Lord one thousand eight hundred and eighty-nine, the same being one of the regular juridical days of the February term, A. D. 1889, of said court, the following proceedings were had therein, among others, and were duly entered of record—that is to say:

In the Matter of ALFRED S. ELLET, by JOHN A. ELLET, Guardian,
Plaintiff,
vs.
DAVID F. CAMPBELL, Defendant.

30 At this day, by consent of counsel, it is ordered that this action be docketed for trial on Monday, the twenty-fifth day of February, A. D. 1889.

And afterwards and on, to wit, *on* the third day of the month of September, in the year of our Lord one thousand eight hundred and eighty-nine, the same being one of the regular juridical days of the September term, A. D. 1889, of said court, the following proceedings, among others, were had therein and were duly entered of record therein—that is to say:

In the Matter of ALFRED S. ELLET, by JOHN A. ELLET, Guardian,
Plaintiff,
vs.
DAVID F. CAMPBELL, Defendant.

At this day, parties consenting thereto, it is ordered that this action be docketed for trial to the court sitting without a jury on the 4th day of September, 1889, at 10 o'clock in the forenoon.

And afterwards and on, to wit, *on* the fourth day of the month of September, in the year of our Lord one thousand eight hundred and eighty-nine, there was filed in the office of the clerk of said court a certain replication; which said replication is in words and figures following—that is to say:

In the District Court of the County of Boulder, Colorado.

31 ALFRED S. ELLET, by JOHN A. ELLET, His Guardian, Plaintiff,
vs.
DAVID F. CAMPBELL, Defendant.

Plaintiff, replying to the answer herein—

1. Admits that said Bonanza lode was not staked upon the surface, nor was any discovery shaft sunk or work done upon said lode upon the surface of the ground; but defendant alleges that the location made, as set forth in the complaint herein, was a valid location, and that the said certificate of location was sufficient in law, and that the same described said Bonanza lode by reference to permanent monuments and with reasonable certainty as the same is set forth in said complaint.

2. Denies that at the point where the said J. L. Sanderson lode was cut and discovered and the discovery shaft sunk the land was unoccupied public mineral domain, but, on the contrary, avers that the same had theretofore been appropriated by the said Corning tunnel site and the discovery and location of said Bonanza lode.

ROGERS & SHAFROTH,
Att'ys of Pl't'ff.

STATE OF COLORADO, } ss:
County of Boulder, }

John A. Ellet, guardian of the plaintiff in the above-entitled cause, being duly sworn, on his oath says that he has read the foregoing reply and knows the contents thereof, and that the same is
32 true of his own knowledge, except as to the matters therein stated on information and belief, and as to those he believes it to be true.

(Signed) JOHN A. ELLET.

District Court Seal. Subscribed and sworn to before me this 4th day of Sept., 1889.

(Signed) EUGENE WILDER,
Clerk District Court.

(Indorsement:) No. 2293. In district court, county of Boulder. Alfred S. Ellet, by John A. Ellet, guardian, plaintiff, *vs.* David F. Campbell, defendant. Reply. Filed in district court Sep. 4, 1889. (Signed) E. Wilder, clerk. Rogers & Shafroth, att'ys of pl't'ff, Denver, Colo.

And afterwards, but on the same day, to wit, on the fourth day of the month of September, in the year of our Lord one thousand eight hundred and eighty-nine, there was filed in the office of the clerk of said court a certain agreed statement of facts; which said agreed statement of facts is in words and figures following—that is to say:

STATE OF COLORADO, } ss:
County of Boulder, }

In the District Court in and for said County.

ALFRED S. ELLET, by JOHN A. ELLET, His Guardian, }
vs. }
DAVID F. CAMPBELL. }

33 This case is submitted to the court on the following agreed statement of facts, in addition to the admissions heretofore made in the pleadings:

I.

The allegations and statements in the sixth paragraph of the complaint are admitted.

II.

It is admitted that the Bonanza lode was cut and discovered on the 3rd day of February, 1875, as stated and alleged in the seventh paragraph of the complaint, and the several acts and things stated and alleged in the seventh paragraph were done and performed by said tunnel company with reference to the locating of the said lode, and that the said tunnel company was then owner of said tunnel, as charged in said paragraph; but it is admitted the said Bonanza lode was never staked on the surface, nor was any discovery shaft sunk or work done upon the said lode upon the surface of the ground, nor was the point on the surface marked or designated under which the discovery point of said lode might be found.

III.

The allegations and statements as to the filing of the location certificate of the Bonanza lode are admitted as stated in the eighth paragraph of the complaint by location certificate, in words and figures following:

34 TERRITORY OF COLORADO, }
County of Boulder. }

Know all men by these presents that we, the Corning Tunnel Company, claim by right of discovery and by right of location 1,500 feet, linear and horizontal measurement, on the Bonanza lode, along the vein thereof, with all its dips, variations, and angles, together with the amount of surface necessary for working the same and allowed by law, 750 feet of said lode so located lying and being

easterly of the discovery on said lode and 750 feet being westerly of said discovery, said lode being more particularly described as follows, to wit: Beginning at a point in the Corning tunnel 594 feet from the face of said tunnel and extending from said point 750 feet easterly and 750 feet westerly, the bearing of said lode is about N. 78° E. This lode was discovered in the Corning tunnel, and it is claimed under the provisions of sec. 4 of an act of Congress approved May 10th, 1872, in Gold Hill mining district. Said lode was discovered and was located on the 3 day of Feb., A. D. 1875.

(Signed) FREDERICK A. SQUIRES, *Pres.*
DANIEL A. ROBINSON, *Secretary.*

(Indorsed on back:) Location certificate, Bonanza lode. Territory of Colorado, county of Boulder, *ss:* Filed for record this 9th day of February, A. D. 1875, at 2¼ o'clock p. m. Recorded in Book "U," page 265. (Signed) A. E. Lea, recorder.

It is admitted at the time said certificate was made and filed Frederick A. Squires was president and Daniel A. Robinson was secretary of said Corning Tunnel Company.

IV.

The allegations and statements contained in the ninth, tenth, eleventh, and twelfth paragraphs of the complaint are admitted.

V.

It is admitted the Bonanza lode and J. L. Sanderson locations are different locations made on one and the same lode and vein, and that the discovery cut by which the said J. L. Sanderson lode was discovered is two hundred feet to the east of the line of the bore of the said Corning tunnel; and that Cyrus Taylor and defendant Campbell knew at the time they assumed to discover and locate the said J. L. Sanderson lode the Corning Tunnel
35 Company had cut and discovered the lode they call the Bonanza, and that the said Bonanza lode did not appear on the surface of the ground.

VI.

It is admitted said Cyrus Taylor and David F. Campbell did everything requisite and necessary to be done in discovering and marking the point of discovery of said J. L. Sanderson lode and in marking the surface boundaries thereof, and that they fully complied with the laws of the State of Colorado and those of the United States regarding the discovery and location of lodes on the public mineral domain, and they have kept their title good to said lode by doing annual labor thereon since its discovery, and unless plaintiff has the better right and title to the ground under the name of the Bonanza lode as owner of the said Corning tunnel defendants should recover.

It is admitted the location certificate of the J. L. Sanderson lode is in words and figures following, to wit:

No. 2079.

Location Certificate of the J. L. Sanderson Lode. Filed for Record Aug. 30th, A. D. 1886, at 12.25 O'clock P. M. E. J. Morath, Recorder.

Know all men by these presents that we, the undersigned, have located and hereby claim by right of discovery and location fifteen hundred feet, linear and horizontal measurement, on the J. L. Sanderson lode, together with all veins, lodes, ledges, and surface ground within the lines of said claim, as hereinafter stated; seven hundred and fifty (750) feet on said lode running north 73° 0′ east from the center of the discovery shaft on said lode and seven hundred and fifty (750) feet running south 73° 0′ west therefrom, said lode being situated in Gold Hill mining district, Boulder county and State of Colorado, and more particularly described as follows:

36 Beginning at a post set in a mound of stones marked S. W. cor., No 1, J. L. Sanderson lode, var. 14° 30′ east, whence cor. No. 1, survey No. 353, Alturess lode, bears S. 75° 0′ E. 240 feet; thence N. 17° 0′ W. 150 feet to northwest side line center post, 1,500 feet to N. E. cor., No. 3; thence S. 17° 0′ E. 150 feet to S. E. cor., No. 4; thence S. 73° 0′ W. 750 feet to southeast side line center post, 1,500 feet to cor. No. 1, place of beginning, and forming a portion of the north half (½) of section twelve (12), township one (1) north, of range seventy-two (72) west, of the sixth principal meridian. Said lode was discovered tenth July, A. D. 1886, and was located twenty-sixth August, 1886.

CYRUS TAYLOR.
DAVID F. CAMPBELL.

Date of certificate, twenty-sixth August, 1886.

VII.

It is admitted that the original incorporators of the Corning tunnel and the plaintiff, as well as the defendant Campbell and Cyrus W. Taylor, were and all are citizens of the United States. It is admitted that the value of the property in dispute in this action exceeds in value ten thousand dollars, exclusive of costs.

VIII.

It is admitted plaintiff has expended in procuring abstracts and plats for the purpose of filing an adverse claim twenty-five dollars, and that he paid fifty dollars for preparing the adverse claim.

It is admitted at the time of the location of the Corning tunnel and at all times thereafter, including the time the various steps were taken by Taylor and Campbell to locate the J. L. Sanderson lode, there were no rules, customs, or regulations of miners of said Gold Hill mining district regarding the location of tunnels

37 nor the discovery or location of lodes, but that everything

done in that behalf was governed by the laws of the State of Colorado and those of the United States.

(Signed) ROGERS & SHAFROTH,
Att'ys for Pl'ff.

(Signed) L. C. ROCKWELL,
Att'y for Def't.

(Indorsement:) No. 2293. Alfred S. Ellet *vs.* D. F. Campbell. Stipulation as to facts. Filed in district court Sep. 4, 1889. (Signed) E. Wilder, clerk.

And afterwards and on, to wit, *on* the sixth day of the month of February, in the year of our Lord one thousand eight hundred and ninety, the same being one of the regular juridical days of the February term, A. D. 1890, of said court, the following proceedings, among others, were had and duly entered of record therein—that is to say:

38 In the Matter of ALFRED S. ELLET, by JOHN A. ELLET, Guardian, Plaintiff,
vs.
DAVID F. CAMPBELL, Defendant.

At this day, by agreement and consent of counsel, it is ordered that this action be docketed for trial on Monday, February 10th, 1890, evening.

And afterwards, and on, to wit, *on* the eleventh day of the month of February, in the year of our Lord one thousand eight hundred and ninety, the same being one of the regular juridical days of the February term, A. D. 1890, of said court, the following proceedings, among others, were had and duly entered of record therein—that is to say:

In the Matter of ALFRED S. ELLET, by JOHN A. ELLET, Guardian, Plaintiff,
vs.
DAVID F. CAMPBELL, Defendant.

At this day come the parties to this action, by their respective attorneys, Platt Rogers, Esquire, appearing for the plaintiff, and L. C. Rockwell, Esquire, appearing for the defendant.

And this cause comes on now to be heard by the court upon an agreed statement of facts, and the court, after listening to arguments of counsel, doth take the action under advisement.

39 And afterwards and on, to wit, *on* the thirteenth day of the month of September, in the year of our Lord one thousand eight hundred and ninety, there was filed in the office of the clerk of said court a certain finding and opinion of the court; which said finding and opinion is in words and figures following—that is to say:

STATE OF COLORADO, } ss:
County of Boulder, }

In the District Court.

ALFRED S. ELLET, by JOHN A. ELLET, His Guardian, Plaintiff, }
vs. }
DAVID F. CAMPBELL, Defendant. }

This is an action brought in support of an adverse claim filed in the United States land office. By agreement of the parties it was tried without the intervention of a jury upon an agreed statement of facts. The decision rests upon the construction of section 2323 of the Revised Statutes of the United States, which is as follows:

"Where a tunnel is run for the development of a vein or lode, or for the discovery of mines, the owners of such tunnel shall have the right of possession of all veins or lodes within three thousand feet from the face of such tunnel on the line thereof, not previously known to exist, discovered in such tunnel, to the same extent as if discovered from the surface; and locations on the line of such tunnel of veins or lodes not appearing on the surface, made by other parties after the commencement of the tunnel, and while the same is being prosecuted with reasonable diligence, shall be invalid; but failure to prosecute the work on the tunnel for six months shall be considered as an abandonment of the right to all undiscovered veins on the line of such tunnel."

40 The Corning Tunnel Company, from which the plaintiff claims, under that section ran a tunnel, and a lode called by it the "Bonanza" lode was cut and discovered in 1875 on the line of the tunnel. The plaintiff claims that the then owner of the tunnel did all the acts necessary in locating that lode under the provisions of the Federal and State statutes.

The defendant concedes that all such acts were done by the company, except that the lode was never staked upon the surface of the ground, nor was the point on the surface marked or designated under which the discovery point of said lode might be found. The parties agree, as a matter of fact, that no staking of the lode on the surface was ever done. After the Bonanza lode was discovered the defendant, knowing that the tunnel company had cut and discovered the Bonanza lode, went upon the surface of the ground, sunk a shaft, discovered and located, as the law provides, the J. L. Sanderson lode. These two locations—the Bonanza lode and the Sanderson lode—are different locations and, as afterward ascertained by the plaintiff in following up the Bonanza lode to the surface, are on one and the same lode and vein, though, as has just been said, different locations. The latter location is not on the line or bore of the tunnel, as the same is defined to be by our supreme court "the width marked by the exterior lines or sides of the tunnel," but is two hundred feet to the east of the line of the tunnel.

41 Stating the contention of the parties, then, in other words, the plaintiff's position is that where a tunnel is run for the

discovery of a mine and a lode is discovered in the prosecution of such work, the owner of the tunnel is entitled to the possession thereof by the mere act of discovery, without perfecting or following up such discovery by a compliance with the statutes, State and Federal, relating to the staking and marking of the boundaries of the claim upon the surface of the ground.

The defendant, on the contrary, says that the provisions of section 2324 of the Revised Statutes and the provisions of the laws of Colorado in relation to the marking of the claim and the filing of a location certificate apply to a case of this kind, and in order to protect himself against subsequent locators the owner of a tunnel, when a lode is thus discovered, must comply with these last-mentioned provisions.

The counsel have been able to cite no case directly in point. There are rulings by the United States land officers directly in point, and while these, of course, are not conclusive here, yet they may serve to throw some light upon the controversy. It will be seen from Copp's Mining Law, page 237, page 249, and page 135, that the Interior Department has never allowed the patenting of a lode discovered in running a tunnel unless the same has been staked upon the surface of the ground. Mr. Morrison, in his work on Mining Rights, at page 39, is inclined to believe that possibly the staking in such case is not required in order to constitute a valid location.

42 Wade on Mining Law, page 40, holds to the opposite view.

In Bach *v.* Sierra Nevada Con. Mg. Co., 17 Pac. Rep., 83, the supreme court of Idaho discusses a case in some respects similar to this, though in that case the later location was made directly on the line of the tunnel, and in its facts is, in my judgment, essentially different from the case at bar.

In Hope Mg. Co. *v.* Brown, 18 Pac. Rep., 218, the supreme court of Montana decided a cause more in point, though not the precise point in litigation here. These cases, it may be said, do not aid us very much in the decision of this case.

In Glacier Mg. Co. *v.* Willis, 127 U. S., 471, in error to the circuit court of the United States for the district of Colorado, the Supreme Court of the United States discusses the provisions of section 2323. However, the case was decided by that court mainly on a question of pleading, though it would seem that the court construes the phrase "to the same extent as if discovered from the surface." The record of the circuit court shows that Judge Hallett held in this case, though the point seems not to have been raised in the Supreme Court, that the discoverer of a lode thus cut in running a tunnel must, to protect his location, stake it on the surface. The question is by no means free from doubt in my mind. There are strong and persuasive reasons why staking should not be required. Cases may be readily imagined where, if this provision was applicable, the tunnel-owner may practicably be robbed of the

43 fruits of his labor, where no advantage accrues to him over one who uncovers a vein from the surface. Where, for example, a lode may be discovered at the end of a tunnel three thou-

sand feet from the surface, when it would be impossible, within the time prescribed by the statute in relation to the filing of a location certificate and marking the surface boundaries, to hole up to the surface and accurately mark the surface boundaries of the claim. Other forcible reasons might be suggested were it necessary.

It may be and probably is true that the phrase "to the same extent as if discovered from the surface" means to the same extent geographically—that is, of the same size—yet it does not seem to me to follow that this construction of the language excepts the case at bar from the further provisions of the law relating to the marking of the boundaries of the claim on the surface so that it can be readily traced. The United States laws and the State laws seem to me to be imperative that every lode, whether discovered from the surface or discovered by the running of a tunnel, must thereafter be staked upon the surface and segregated from the public domain, as specifically pointed out by the statute.

In this connection, the language of our supreme court in The Corning Tunnel Company *et al. v.* Pell, 4 Colo., 510, seems to me significant. "The effect of the section (section 2323, Revised Statutes) is to give a party running a tunnel for any purpose, whether for development or for prospecting, the right to pre-empt and locate any and all lodes not previously known to exist, dis-
44 covered in such tunnel, to the same extent as if discovered from the surface"—that is, he has the right to "locate" any lode he may thus discover. Now, the question is, how is a valid location made under our laws? To "discover" a lode in running a tunnel is the same thing as to "discover" a lode by sinking a shaft from the surface. In each case a "discovery" is a condition precedent to a valid location. To constitute a valid location in either case, whether the discovery is made from the surface or in running a tunnel, the same acts must be done. The law certainly contemplates the patenting of a claim as clearly as the discovery of it, and there is no provision for the patenting of a tunnel and the law knows no such thing as the patenting of that which is not marked on the surface to designate it from the surrounding territory. If for no other reason than this the tunnel cannot, in my judgment, be treated as a claim. Our law provides that the discoverer of a lode shall record his claim, and that before he files his location certificate he shall, among other things, mark the surface boundaries of his claim. This is broad language, broad enough to cover the case where the discovery is made by running a tunnel, as well as by sinking a shaft, from the surface.

The right of possession given the tunnel-owner is of all lodes, etc., on the line of the tunnel to the same extent as if discovered from the surface, and this right of possession to the line of the tunnel is a different question from the extent of such right. Right of possession is also given to the owner of a claim wherein a lode is discovered by sinking a shaft from the surface. It seems
45 to me that the right in either case is not absolute. By the express provisions of the section under consideration a failure to prosecute work on the tunnel for six months forfeits the

right of possession; and to perfect the right in either case, unless the other and express provisions of the law are set aside, it must not only first be discovered, but after this, and within the statutory time, the usual steps must be taken to locate the claim—that is, fix the boundaries and the locus. In other words, sec. 2323 relates to the discovery of a lode, not to its location. The other provisions of the statutes relating to the staking of a lode once discovered apply to a lode however it may have been discovered.

The possessory right to the lodes designated in the section given to the owner of a tunnel is no greater than and in no respect different from the possessory right given to the surface locator. The right in the former as in the latter case contemplates that it is to be perfected, among other things, by subsequent staking and filing of a location certificate. The fruits of his labor are still, in large measure, enjoyed by the tunnel-owner by the provision that by diligent prosecution of work on the tunnel its owner has the paramount right to lodes subsequently cut in driving the tunnel as against another locator who, though prior in time in the actual discovery and location of the lode, yet is subsequent in time to the beginning of work on the tunnel.

It follows from the foregoing views that the judgment in this case must be for the defendant, and let the judgment be so entered.

46 By the court:

(Signed) JOHN CAMPBELL, *Judge.*

(Indorsement:) 2293. In district court, Boulder county. Alfred S. Ellet, by John A. Ellet, guardian, *vs.* David F. Campbell. Finding and opinion of the court. Filed in district court Sep. 13, 1890. (Signed) E. Wilder, clerk.

And afterwards and on, to wit, *on* the thirteenth day of the month of September, in the year of our Lord one thousand eight hundred and ninety, the same being one of the regular juridical days of the September term, A. D. 1890, of said court, the following proceedings were had in said court and were duly entered of record therein—that is to say:

In the Matter of ALFRED S. ELLET, by JOHN A. ELLET, Guardian, Plaintiff,
vs.
DAVID F. CAMPBELL, Defendant. } Judgment.

This cause having been heretofore and on the eleventh day of February, A. D. 1890, submitted to the court for trial without a jury, a jury having been waived by the respective parties in open
47 court, whereupon came Platt Rogers, Esquire, attorney for the plaintiff, and L. C. Rockwell, Esquire, attorney for the defendant, and submitted to the court an agreed statement of facts on which the cause was to be tried, and, after argument of counsel for the respective parties, the court took the same under advisement.

And now, on this thirteenth day of September, A. D. 1890, the court, being now sufficiently advised in the premises, finds the issues herein joined for the defendant, and further finds that at the time this action was commenced defendant had the better right to the use, occupation, and possession of the lode mining claim and premises described in the complaint under the rules, regulations, and customs of miners of Gold Hill mining district, in Boulder county, Colorado, and under the laws of the State of Colorado and those of the United States relating to the discovery, location, and possession of lode mining claims upon the public mineral domain of the United States, and that defendant has a better right to a patent for the ground and premises in dispute.

The court further finds the defendant has the right to hold, occupy, possess, and enjoy the ground in dispute by right of discovery and location of the J. L. Sanderson lode, and of possessing the same under the laws of the State of Colorado and those of the United States.

It is therefore ordered, considered, and adjudged by the court that plaintiff take nothing in and by his said complaint, and that defendant go hence without day, and that defendant, David F. Campbell, do recover of and from the plaintiff his costs and disbursements in this behalf expended, to be taxed, and that execution issue
48 therefor.

In the Matter of ALFRED S. ELLET, by JOHN A. ELLET, Guardian,
Plaintiff,
vs.
DAVID F. CAMPBELL, Defendant.

And now comes the plaintiff, by counsel, and excepts to the finding and judgment of the court, and prays an appeal to the supreme court, which is allowed, conditioned that he file a bond on appeal in the sum of five hundred dollars, with sureties thereon to be approved by the clerk of this court, and that he tender his bill of exceptions in ninety days from this date, said bond on appeal to be filed within thirty days.

And afterwards and on, to wit, *on* the twenty-seventh day of the month of September, in the year of our Lord one thousand eight hundred and ninety, there was filed in the office of the clerk of said court a certain bond on appeal; which said bond on appeal was duly approved by the clerk of said court and is in words and figures following—that is to say:

Know all men by these presents that we, Alfred S. Ellet, by John A. Ellet, his guardian, as principal, and J. G. Cope, as surety, are held and firmly bound unto David F. Campbell in the penal sum
49 of five hundred dollars ($500.00); for the payment of which, well and truly to be made, we bind ourselves, our heirs, executors, administrators, and assigns, firmly by these presents.

Witness our hands and seals this 27th day of September, A. D. 1890.

Whereas on the 30th day of March, A. D. 1888, said David F. Campbell filed in the United States land office at Central City, Colorado, his application for a patent on the J. L. Sanderson lode, in Gold Hill mining district, in the county of Boulder and State of Colorado, to which on the first day of June, A. D. 1888, said Alfred S. Ellet filed his protest and adverse claim on behalf of the Corning tunnel and Bonanza lode, located in said Gold Hill mining district, and in support of said protest and adverse claim the said Alfred S. Ellet, by John A. Ellet, his guardian, brought his action in the district court of the county of Boulder, in the State of Colorado, in which said action said Alfred S. Ellet was plaintiff and said David F. Campbell was defendant, to recover possession of the following-described premises, as part and portion of said Corning tunnel site, to wit:

Beginning at corner No. 4 of said so-called J. L. Sanderson lode, the same being south 13° 39′ west 641.4 ft. from the face of said Corning tunnel, thence north 73° 32′ east 901 feet to a corner, thence south 2° east 162 feet to a corner, thence south 73° 32′ west 837.5 feet to corner No. 3 of said J. L. Sanderson lode, thence north 15° 28′ west 150 feet to the place of beginning, and to establish the title of said plaintiff to said premises; and

50 Whereas on the 13th day of September, A. D. 1890, by the judgment and decree of said district court the plaintiff was declared to have no right, title, or interest in the premises described, and was also adjudged to pay the costs of said proceeding; and

Whereas from said judgment and decree the said Alfred S. Ellet has prayed and been allowed an appeal to the supreme court of the State of Colorado:

Now, therefore, the condition of the foregoing obligation is such that if the said Alfred S. Ellet will prosecute said appeal without delay and with effect and will pay whatever sum may be adjudged due to said Campbell upon said appeal and all costs, interest, and damages on account thereof in case said judgment is affirmed, then this obligation shall be null and void; otherwise to remain in full force and effect.

(Signed) ALFRED S. ELLET,
By JOHN A. ELLET, *Guardian.* [SEAL.]
J. G. COPE. [SEAL.]

STATE OF COLORADO, }
County of Boulder, } *ss:*

Personally appeared this day before me J. G. Cope, of Boulder, in the county of Boulder and State aforesaid, the surety on the bond of Alfred S. Ellet, who, being duly sworn, deposes and says that he is seized and possessed in his own right, over and above

51 all his just debts and liabilities, in property not exempt by law from levy and sale under execution, of a clear, unencumbered estate of the value of five hundred dollars within the jurisdiction of this State.

(Signed) J. G. COPE.

[NOTARIAL SEAL.] Subscribed and sworn to before me this 27th day of September, A. D. 1890.

(Signed) H. E. ROWLAND,
Notary Public.

(Indorsement:) 2293. In district court, county of Boulder. Alfred S. Ellet, by John A. Ellet, guardian, pl't'ff, *vs.* David F. Campbell, def't. Bond on appeal. Approved and filed in district court Sep. 27, 1890. (Signed) E. Wilder, clerk.

STATE OF COLORADO, } *ss:*
County of Boulder, }

I, Eugene Wilder, clerk of the district court of the eighth judicial district of the State of Colorado in and for the county of Boulder, and as such clerk custodian of the files and records of said court, do hereby certify the foregoing to be a full, true, and correct transcript of (1) the complaint, (2) the demurrer to the complaint, (3) the answer to the complaint, (4) the replication of plaintiff, (5) the stipulation of facts, (6) the findings and
52 opinion of the court, and (7) the appeal bond, together with all the record entries, in a certain cause of action lately pending in said court, wherein Alfred S. Ellet, by John A. Ellet, his guardian, was plaintiff and David F. Campbell was defendant, as fully and perfectly as the same now remains on file and of record in my office.

In witness whereof I do hereunto set my hand and affix [SEAL.] the seal of said court, at Boulder, in said county and State, this twenty-seventh day of December, A. D. 1890.

EUGENE WILDER,
Clerk District Court.

In the Supreme Court of the State of Colorado.

ALFRED S. ELLET, by JOHN A. ELLET, Guardian, Appellant, *vs.* DAVID F. CAMPBELL, Respondent. } Appeal from District Court of Boulder County.

Assignment of Error.

And now comes the said appellant, by Rogers, Shafroth & Whitford, his attorneys, and says there is manifest error in the record and proceedings of the said district court of the county of Boulder, in this, to wit:

1. The court erred in finding for defendant.
2. The court erred in giving judgment for defendant.

ROGERS, SHAFROTH & WHITFORD,
Attorneys for Appellant.

53 (Endorsement:) No. 2895. In supreme court, State of Colorado. Alfred S. Ellet, by John A. Ellet, guardian, appel-

lant, *vs.* David F. Campbell, appellee. Transcript of record, bill of exceptions, and assignments of errors. Filed in supreme court this 2nd day of January, 1891. James A. Miller, clerk.

54 And afterwards and on, to wit, the sixteenth day of January, A. D. 1892, came the appellee, David F. Campbell, by his attorney, and filed in said cause his joinder in error, which, with the endorsements thereon, is in words and figures as follows, to wit:

STATE OF COLORADO, *ss:*

In the Supreme Court, to the January Term, A. D. 1892.

ALFRED S. ELLET, by JOHN A. ELLET, His Guardian, Appellant, *vs.* DAVID F. CAMPBELL. } No. 2895. District Court of Boulder County. Appeal.

Now comes the said appellee, by L. C. Rockwell, his attorney, and says that there is no error in the record and proceedings nor in the rendition of judgment by the said district court, as assigned herein, and therefore he prays that the said judgment may be affirmed, and that his costs may be adjudged to him, etc.

(Signed) L. C. ROCKWELL,
Attorney for Appellee.

(Endorsement:) No. 2895. In supreme court, Colorado. Alfred S. Ellet, — John A. Ellet, his guardian, *vs.* David F. Campbell. Joinder in error. Filed in supreme court Jan. 16, 1892. James A. Miller, clerk.

55 And on, to wit, the nineteenth day of June, A. D. 1893, the same being one of the juridical days of the April, A. D. 1893, term of said supreme court—there being present Honorable Charles D. Hayt, chief justice; Honorable Luther M. Goddard, judge; Eugene E. Eugley, attorney general; Felix A. Richardson, bailiff, and James A. Miller, clerk—the following further proceedings were had and entered of record in said cause, to wit:

ALFRED S. ELLET, by JOHN A. ELLET, His Guardian, Appellant, *vs.* DAVID F. CAMPBELL, Appellee. } No. 2895. Appeal from District Court of Boulder County.

At this day this cause coming on to be heard, as well upon the transcript of proceedings and judgment had in said district court in and for the county of Boulder as also upon the matters assigned for error herein, and the same having been heretofore argued by counsel and submitted to the consideration and judgment of the court, and it appearing to the court that there is manifest error in the proceedings and judgment aforesaid of said district court, it is therefore considered and adjudged by the court that the judgment aforesaid

of said district court be, and the same is hereby, reversed, annulled, and altogether held for naught, and that this cause be remanded to said district court, with directions to said district court to
56 enter judgment in favor of appellant in accordance with the views expressed in the opinion of the court filed herein at this day.

It is further considered and adjudged by the court that said appellant do have and recover of and from said appellee his costs in this behalf expended, to be taxed, and that he have execution therefor; and let the opinion of the court filed herein be recorded.

And contemporaneously with the entry of the judgment next aforesaid the court handed down its opinion; which said opinion and the endorsements thereon *is* in words and figures as follows, to wit:

57 ALFRED S. ELLET, by JOHN A. ELLET, His Guardian, Appellant,
vs.
DAVID F. CAMPBELL, Appellee. } No. 2895.

Appeal from the district court of Boulder county.

The appellant, Alfred S. Ellet, was plaintiff below, and by his guardian brought this suit in the district court in support of an adverse claim to a certain mineral lode or vein situate in Gold Hill mining district, Boulder county, Colorado.

The cause was tried in the district court upon an agreed statement of facts, in substance as follows:

That the tunnel claim or location under which plaintiff claims title to the mining lode in controversy was and is known by the name of the Corning tunnel.

That on the 18th day of September, A. D. 1872, George C. Corning and others, citizens of the United States, duly located a tunnel claim under the provisions of the acts of Congress and the laws of the Territory (now State) of Colorado relating to tunnel claims 3,000 feet in length, in Gold Hill mining district, in the county of Boulder and then Territory (now State), of Colorado, by posting a plain notice at the point of commencement of said tunnel, giving the names of said locators and the proposed course and length of said tunnel, and by placing along the line thereof for 3,000 feet from said point
58 of commencement, at intervals of 200 feet, stakes plainly marked with the name of said tunnel, and also by running a line on each side of the line of said tunnel and parallel therewith 750 feet distant therefrom and placing stakes thereon at intervals of 200 feet, and by placing at the corners of said tunnel site monuments marked with the name of said tunnel, and by causing to be recorded in the office of the clerk and recorder of said Boulder county, on the 18th day of September, 1872, a certificate of the location of said tunnel, stating therein the point of commencement and the course and length of the line thereof and the names of said locators.

That thereafter and before July 9, 1873, the locators established the face of said tunnel and expended in the work and labor required therefor the sum of $1,000, and ran said tunnel 130 feet from the face thereof, seven feet high and six feet wide, at an expenditure of $5,000; and thereupon placed at the face of said tunnel a plain sign or notice, giving the names of the locators as the owners thereof, and a plat of said tunnel claim, giving the location and boundaries thereof and the course and distance of the line of said tunnel and the height and width of said tunnel bore.

That on July 9, 1873, the said locators filed and caused to be recorded in the office of the clerk and recorder of said Boulder county a certificate of the location of said tunnel, stating the point of commencement and the course and length of the line thereof, as the same were respectively stated upon the notice posted at the face of said tunnel, together with an affidavit stating the amount of work done and money expended upon said tunnel, and that it was *bona fide* their intention to prosecute the work on said tunnel for the discovery of mines and development of the same.

59 That the said tunnel so located is described as follows:

"Beginning at a nail driven in the railway track thirteen feet north eight degrees thirty minutes west from the mouth of the Corning tunnel, the same being the place of beginning of said Corning tunnel, whence the quarter-section corner in the east line of section 1, town. 1 north, range seventy-two west, of sixth P. M., bears north forty-four degrees forty-four minutes east three thousand five hundred and fifty-five feet, thence south two degrees east three thousand feet and seven hundred and fifty feet on each side of said line, together with appurtenances."

That the locators and the several successive owners of said tunnel location have continuously and diligently prosecuted the work of running said tunnel, and have expended therein during each year since the location thereof more than one hundred dollars, and have made a total expenditure of one hundred thousand dollars ($100,000), and have erected large and extensive improvements at the face of said tunnel for the convenient working of the same of the value of one thousand dollars.

That on February 3, 1875, the Corning Tunnel Company, a corporation duly organized, was the owner of said Corning tunnel location by sundry mesne conveyances from the locators thereof, and that said tunnel company, while prosecuting the work in said tunnel, cut and discovered within said tunnel and upon the line thereof at a distance of 594 feet from the face of said tunnel a vein of mineral-bearing rock in place, which was named the Bonanza lode, and on said February 3 they posted at the face of said tunnel a plain sign and notice giving the name of said vein, the point of discovery within said tunnel, the general course of said vein from the point of discovery, and claiming 750 feet of said vein on each side of the line of said tunnel; that said Bonanza lode did not appear upon the surface of the ground, and was not known to exist prior to its discovery by the Corning Tunnel Company, as above stated.

60 That on February 9, 1875, said tunnel company filed and caused to be recorded in the office of the clerk and recorder of the county of Boulder a location certificate of said Bonanza lode, giving the name of the lode so discovered and the name of said company as the locator thereof, the point in the line of said tunnel at which said lode was discovered, and claiming seven hundred and fifty feet of said vein upon each side thereof, together with the general course of said vein. The location certificate was as follows:

"TERRITORY OF COLORADO, }
" *County of Boulder.* }

"Know all men by these presents that we, The Corning Tunnel Company, claim, by right of discovery and by right of location, 1,500 feet, linear and horizontal measurement, on the Bonanza lode, along the vein thereof, with all its dips, variations, and angles, together with the amount of surface necessary for working the same and allowed by law, 750 feet of said lode so located lying and being easterly of the discovery on said lode and 750 feet being westerly of said discovery, said lode being more particularly described as follows, to wit: Beginning at a point in the Corning tunnel 594 feet from the face of said tunnel and extending from said point 750 feet easterly and 750 feet westerly. The bearing of said lode is about north 78 degrees east. This lode was discovered in the Corning tunnel and it is claimed under the provisions of section 4 of an act of Congress approved May 10th, 1872, in Gold Hill mining district; said lode was discovered and was located on the 3rd day of February, A. D. 1875.

(Signed) FREDERICK A. SQUIRES, *Pres.*
DANIEL A. ROBINSON, *Sec'y.*"

(Indorsed on back:) "Location certificate, Bonanza lode. Territory of Colorado, county of Boulder, *ss.* Filed for record this 9th day of February, A. D. 1875, at 2¼ o'clock p. m. Recorded in Book 'U,' page 265. (Signed) A. E. Lea, recorder."

It is admitted that at the time said certificate was made and filed Frederick A. Squires was president and Daniel A. Robinson was secretary of said Corning Tunnel Company.

That said Bonanza lode was never staked on the surface nor was any discovery shaft sunk or work done upon the said lode upon the surface of the ground, nor was the point on the surface marked under which the discovery point of said lode might be found.

61 That plaintiff was and is a citizen of the United States and was duly authorized to bring this suit by his guardian, and that by sundry mesne conveyances he had become and was the owner of said tunnel claim and of said Bonanza lode discovered therein, and that at all times since the discovery of said Bonanza lode the owners of said tunnel claim had continuously and diligently prosecuted work on said lode and had expended thereon each year the sum of $100.

That on July 10, 1886, the defendant Campbell and one Cyrus Taylor, with full knowledge of the location of said tunnel claim and of the discovery and location of said Bonanza lode as aforesaid, made a location of a certain lode called the J. L. Sanderson lode; that the Bonanza and the J. L. Sanderson locations are different locations made on one and the same lode and vein, and that the discovery cut by which the said J. L. Sanderson lode was discovered is 200 feet to the east of the line of the bore in the said Corning tunnel, and that Cyrus Taylor and defendant Campbell knew at the time they assumed to discover and locate the said J. L. Sanderson lode that the Corning Tunnel Company had discovered and located the Bonanza lode, as above stated.

The location certificate of the J. L. Sanderson lode was as follows:

"*Location Certificate of the J. L. Sanderson Lode. Filed for Record August 30th, A. D.* 1886, *at* 12.25 *o'clock p. m. E. J. Morath, Recorder.*

"Know all men by these presents that we, the undersigned, have located and hereby claim, by right of discovery and location, fifteen hundred feet, linear and horizontal measurement, on the J. L. Sanderson lode, together with all veins, lodes, ledges, and surface ground within the lines of said claim, as hereinafter stated, seven hundred and fifty (750) feet on said lode running north 73 degrees east from the center of the discovery shaft on said lode, and seven hundred and fifty (750) feet running south 73 degrees west therefrom, said lode being situated in Gold Hill mining district, Boulder county and State of Colorado, and more particularly described as follows:

62 "Beginning at a post set in a mound of stones marked southwest cor. No. 1, J. L. Sanderson lode, var. 14 degrees 30 minutes east, whence cor. No. 1, survey No. 353, Alturess lode, bears south 75 degrees east 240 feet; thence north 17 degrees west 150 feet to northwest side line centre post 1,500 feet to northeast cor. No. 3; thence south 17 degrees east 150 feet to southeast cor. No. 4; thence south 73 degrees west 750 feet to southeast side line centre post 1,500 feet to cor. No. 1, place of beginning, and forming a portion of the north half ($\frac{1}{2}$) of section 12, township one (1) north, of range seventy-two (72) west, of the sixth principal meridian. Said lode was discovered tenth July, A. D. 1886, and was located twenty-sixth August, 1886.

"CYRUS TAYLOR.
"DAVID F. CAMPBELL.

"Date of certificate twenty-sixth August, 1886."

That said Taylor and the defendant Campbell did everything requisite to be done in discovering and marking the point of discovery of said J. L. Sanderson lode and in marking the surface boundaries thereof, and that they fully complied with the laws of the State of Colorado and of the United States regarding the dis-

covery and location of lodes upon the public mineral domain, and that they have done the requisite annual labor thereon since its discovery, and that they have kept their title good unless plaintiff has the better right and title to the ground under the name of the Bonanza lode.

The district court decided in favor of appellee Campbell. This appeal is brought to review that decision.

Mr. Justice ELLIOTT delivered the opinion of the court.:

This was an adverse suit, instituted in behalf of appellant by his guardian "to determine the question of the right of possession" to a certain mineral vein or lode.

Appellee Campbell had filed his application for a patent to said lode, basing his claim upon a surface discovery and location. The adverse claim of appellant is based upon a prior discovery and location of the same lode in a tunnel. Appellant does not claim
63 that he is entitled to a patent to the lode as the result of this litigation; but he claims "the right of possession" thereto by virtue of prior discovery and continued compliance with the act of Congress providing for the running of tunnels "for the development of a vein or lode or for the discovery of mines." Sec. 2323, Rev. Stats. U. S.

Having all the rights of the prior discoverer and locator of such lode in a tunnel duly located, appellant claims that he is entitled to be protected in such right of possession against any and all junior locators of the same lode, and, hence, that appellee is not entitled to a patent upon his junior location.

Sec. 2326 Rev. Stats. U. S., amendment of Mar. 3, 1881.

The facts of the case are admitted. By the agreed statement it appears that appellant is the owner of a valid tunnel location duly made upon unappropriated public domain under the act of Congress and the laws of Colorado; that such tunnel was commenced in September, 1872, and that work therein was thereafter prosecuted with diligence for the discovery of mineral veins or lodes; that the lode in controversy was discovered in said tunnel on February 3, 1875; that said lode did not appear upon the surface and was not previously known to exist; that upon its discovery it was by the tunnel-owners located by posting at the face of the tunnel a plain sign and notice giving the name of the vein, the point of discovery within the tunnel, the general course of the vein from the point of discovery, and claiming 750 feet of said vein on each side of the line of the tunnel; and that thereafter and on February 9, 1875, a location certificate of said lode, specifying the matters aforesaid, was duly recorded in the office of the clerk and recorder of the proper county.

64 The tunnel location was duly made, its boundaries were plainly marked upon the surface, and a certificate thereof was duly recorded as a mining claim, but the lode in controversy as discovered therein was not otherwise separately marked, nor was any work done thereon upon the surface.

In behalf of appellee it is contended that appellant's claim to the lode is wholly without right. It is broadly asserted that the discovery of a lode in a tunnel in pursuance of section 2323, cited above, cannot under any circumstances give the discoverer any right to the lode unless accompanied by a surface location in accordance with other statutory provisions. In other words, it is contended that a tunnel location, however perfectly made, described, and recorded, even when accompanied by a complete notice, description, and record of the lode discovered in the tunnel, is of no avail to protect a prior discovery in the tunnel against a junior surface location of the same lode.

In determining the controversy thus presented it is necessary to consider, interpret, and, if necessary, construe the statutory enactments applicable to the discovery and location of mineral lodes. Section 2323, above cited, commonly called the tunnel-site act, is specially applicable to lodes and veins discovered in tunnel locations. It reads as follows:

"SEC. 2323. Where a tunnel is run for the development of a vein or lode, or for the discovery of mines, the owners of such tunnel shall have the right of possession of all veins or lodes within three thousand feet from the face of such tunnel on the line thereof, not previously known to exist, discovered in such tunnel, to the same extent as if discovered from the surface; and locations on the line of such tunnel of veins or lodes not appearing on the surface, made by other parties after the commencement of the tunnel, and while the same is being prosecuted with reasonable diligence shall be invalid; but failure to prosecute the work on the tunnel for six months shall be considered as an abandonment of the right to all undiscovered veins on the line of such tunnel."

65 Is this section the only one applicable to tunnel discoveries and locations, or must the discoverer of a lode in a tunnel, in order to protect his claim, comply strictly with other statutory provisions relating to the discovery and location of mining claims? In resolving this question, as in other cases of like nature, the meaning and application of the statute is to be ascertained by considering its origin, its history, its purposes and objects, as well as its subject-matter and the language employed.

By the act of Congress of July 26, 1866, the mineral lands of the public domain, surveyed and unsurveyed, were opened to exploration and occupation by citizens of the United States. Practically, the act provided for giving away mines of gold and silver and other precious mineral deposits to those who would seek for and find them. Every encouragement was offered to those who would undertake to discover and develop the mineral resources of the country and thus add to the volume of the precious metals. The nation had just emerged from a great civil war, and an increase of the money metals was necessary as a basis for the monetary system of the Government. Such increase was also essential to the prosperity of a free and enterprising people just entering upon a new era of national and individual life. The liberal acts of Congress upon the subject of mines and mining have been supplemented by a liberal construc-

tion of such acts by the national judiciary, as well as by the local courts of the mining States and Territories.

It was not until the revision of 1872 that any general act was passed to encourage the discovery and development of mineral lodes by means of tunnels. Such was the date of the passage
66 of the tunnel-site act. What object or purpose could have induced Congress to enact section 2323? There is but one answer: It was to encourage the discovery of the hidden mineral wealth which was believed to exist in the deepest recesses of the mountains. What consideration was adequate to compensate those undertaking a work requiring such large expenditures of time and money and involving such risks and dangers? Nothing short of the guaranty of the Government that they should hold and enjoy the fruits of their discoveries upon compliance with the terms of the statute. Every consideration, therefore, requires that the tunnel-site act should receive the most liberal construction consistent with reason and the language employed.

Section 2323 was obviously designed to encourage the running of tunnels for the discovery and development of veins or lodes of the precious metals not appearing on the surface and not previously known to exist. Little encouragement would the act give if the discoverer of a lode in a tunnel were bound also to find the apex and course of such vein, uncover the same from the surface, sink his location shaft thereon, mark the boundaries thereof, and record his certificate of such surface location the same as if he had made the original discovery from the surface.

The location of a lode from the surface is always attended with more or less difficulty and uncertainty. Mistakes occur in the location of boundary lines, even where the apex and course of the vein lie comparatively near the surface. These difficulties and uncertainties are liable to be greatly increased where a lode is discovered by means of a tunnel driven hundreds and thou-
67 sands of feet into the heart of a great mountain. To require the discoverer of a lode in a tunnel to prospect for the vein upon the surface and uncover and mark its boundaries so as to include its apex and course within the lines of the surface location would be to require a work of supererogation, for no surface location is necessary for the convenient working of a lode discovered in a tunnel location already made. Such requirement would unnecessarily burden the tunnel locator and discoverer. To the great labor and expense of tunneling as a means of location and discovery it would add the labor and expense devolving upon the ordinary surface discoverer and locator. Besides, such a requirement would subject the discoverer of a lode in a tunnel to the hazard of a race for its surface location, and thus the discoverer might have the fruits of his labor wrested from him by a surface locator who had done nothing and expended nothing in the original discovery.

The admitted facts of the present case well illustrate the hardship of the construction contended for by appellee. The tunnel-owners have expended $100,000 in the running and development of their

tunnel location and the discovery of the lode in controversy. Eleven years after such discovery appellee, having full knowledge of the lode discovered and claimed under the tunnel location, proceeds to make a surface location of such lode, and thereupon claims the same as his own, to the exclusion of the tunnel claimant.

The suggestion of counsel that the discoverer of a vein in a tunnel may mark the boundaries thereof, locate the same on the surface, and record his certificate without uncovering or ascertaining the position of the apex or course of the vein seems deserving of
68 but little consideration, for if a discovery and location from the surface be necessary in case of a discovery in a duly located tunnel claim, then the surface location must be correct in order to afford adequate protection; but in case of a discovery in the depths of a great mountain, a surface location without ascertaining the position of the apex or course of the vein would be a chance location, which, if it did not in fact contain such apex and course, would avail nothing against a location made by an exploration and uncovering of the vein from the surface.

Section 2323 does not provide that the discoverer of a vein in a tunnel shall make a surface location thereof, but it does declare that locations made by other parties on the line of such tunnel shall, under certain circumstances, be invalid. Thus the purpose of Congress to protect the discovery of veins or loads in tunnels is clearly manifest. In view of the purpose and language of the several enactments relating to the discovery and location of mineral lodes and the consequences which would flow from a different construction, we feel constrained to hold that when a tunnel-owner has duly located his tunnel claim and thereafter discovers a mineral lode therein, according to all the conditions specified in section 2323, he is not bound to make another discovery and location of the lode from the surface in order to be protected against a subsequent surface locator of the same lode. Thus we interpret the section to mean what its special words plainly import without unnecessarily qualifying their meaning by the general language of other sections.

69 A tunnel location has been called a "tunnel claim" by the highest judicial authority, and it seems that a valid tunnel location may inure to the benefit and protection of mineral lodes discovered in such tunnel. In the present case the tunnel claim was duly located by reference to U. S. Government surveys. A lode not previously known to exist and not appearing on the surface was discovered in such tunnel and on the line thereof while work in the tunnel was being diligently prosecuted for such purpose. Notice of the discovery and location of the lode was immediately posted at the mouth of the tunnel, and the location certificate was duly recorded, describing the lode with reference to such tunnel location. Under such circumstances, in our opinion appellant, as successor in interest to the discoverer, has the right of possession of such lode and is entitled to be protected in such right against appellee, a junior surface locator of the same lode. The views we have thus endeavored to express seem to us to be in harmony with

the opinion of the Supreme Court of the United States in the case of The Glacier Mining Co. *vs.* Willis, 127 U. S., 471–480.

Counsel for appellee contends that the case of The Corning Tunnel Co. *vs.* Pell *et al.*, 4 Colo., 507, decided by this court in 1878, is opposed to the view expressed in this opinion. The Pell case was an action of ejectment brought by the tunnel company in support of an adverse claim. No equitable relief was invoked, nor could any be had according to the practice under which that suit was instituted. At the trial of that case in the lower court there was no evidence and no attempt to prove that the lode in controversy had been discovered in the tunnel. Upon that ground it was
70 held that the tunnel company had not acquired such right of possession as would enable it to maintain ejectment, and so the judgment of nonsuit was granted. Upon appeal the judgment of nonsuit was affirmed upon the same ground, but the court in its opinion discussed and passed upon several questions concerning the rights of tunnel-site claimants, which, though perhaps fairly presented by the record, were not really necessary to the determination of that appeal. What the decision would have been if the lode had been actually discovered by the tunnel company in the tunnel and on the line thereof before suit brought and before Pell discovered and located the lode cannot be certainly known. Pell's location was within the limits of the tunnel location, but not on the line of the tunnel. The court expressed the opinion that the tunnel company did not have the exclusive right of possession to the whole tunnel location, 1,500 x 3,000 feet, and that as the location by Pell was not upon the line of the tunnel—that is, the line of the actual bore or excavation—and as the tunnel company had not discovered the lode in the tunnel, it could not maintain ejectment to recover the lode.

If the tunnel company had discovered the lode in the tunnel and on the line thereof prior to its discovery by Pell, and other conditions had been the same as in this case, the tunnel company's right of possession to the lode might have been maintained to the same extent as if discovered from the surface, without a surface location in addition to the tunnel location. If the views expressed in the Pell case will not bear such a construction, we must decline to be governed by them under the facts admitted in this case.

71 Section 2323 has been considered and construed by the appellate courts of some of our sister States and Territories. See Hope Mining Co. *vs.* Brown, 7 Mont., 550; Hope Mining Co. *vs.* Brown, 11 Mont., 370; also Back *vs.* Sierra Nevada Mining Co., 17 Pac. Rep. (Idaho), 83. It would not subserve any useful purpose to discuss these decisions at length. Though based upon facts somewhat different from the facts of the present case, they are in the main consistent with the views expressed in this opinion.

What is the extent of the tunnel-owner's right of possession to a vein discovered in a tunnel? The language of the statute is that he shall have the right of possession "to the same extent as if discovered from the surface." In our opinion, the words "same extent" mean the same extent "along the vein or lode." While the

acts of Congress leave the width of mining claims upon the surface subject to local regulations within certain limits, the length and depth may not be thus regulated. In this case the location of the tunnel and the discovery of the lode having been made subsequent to the passage of the act of Congress of May 10, 1872, the discoverer was entitled to claim 750 feet of the lode each way from the point of discovery, or, in the language of the statute, "1,500 feet in length along the vein or lode."

Secs. 2320, 2322 Rev. Stats. U. S.
Session Laws Colo., 1874, p. 185.
Gen. Stats. Colo., 1883, sec. 2397.
Morrison's Mining Rights (7th ed.), 22, 23.

In the case of The Glacier Mining Co. *vs.* Willis, *supra*, which was in many respects similar to the present case, the tunnel claimant was restricted to "250 feet each way from said tunnel on
72 each lode discovered;" but in that case the location was made prior to the act of May 10, 1872, regulating the length of mining locations, and so the local laws of Colorado governed as to the length of the claim. Session Laws 1861, p. 166; Gen. Laws, p. 627.

Our conclusion is that the discovery and location of the lode in controversy as claimed by appellant must be held valid, and that the subsequent location of the same lode made by appellee, being "200 feet to the east of the line of the bore of the Corning tunnel," must be held invalid.

The judgment of the district court is reversed and the cause remanded, with directions to enter judgment in favor of appellee in accordance with this opinion.

Reversed.

73 [Vignette.]

THE UNITED STATES OF AMERICA, }
District of Colorado. }

Know all men by these presents that Lewis C. Rockwell, as principal, and —— ——, as suret-, are held and firmly bound unto Alfred S. Ellet in the full and just sum of one thousand ($1,000) dollars, to be paid to the said Alfred S. Ellet; to which payment, well and truly to be made, we bind ourselves, our heirs, executors, and administrators, jointly and severally, firmly by these presents.

Sealed with our seals and dated this 14th day of August, in the year of our Lord one thousand eight hundred and ninety-three.

Whereas lately, at the April term, A. D. 1893, of the supreme court of the State of Colorado, in a suit pending in said court between Alfred S. Ellet, by John A. Ellet, his guardian, *was* appellant, and David F. Campbell, *was* appellee, judgment was rendered against the said D. F. Campbell for costs, and the district court of Boulder county was directed to enter judgment against said D. F. Campbell and in favor of the said Alfred S. Ellet for the J. L. San-

derson lode, and said D. F. Campbell having* obtained a writ of error of the said Supreme Court of the United States to reverse the judgment in the aforesaid suit, and a citation directed to the said Alfred S. Ellet, citing and admonishing him to be and appear at a regular term of said — Court of the United States, to be held at Washington, on the 9th day of October next:

Now, the condition of the above obligation is such that if the said D. F. Campbell shall prosecute said writ to effect and answer all damages and costs if he fail to make good his plea, then the above obligation to be void; else to remain in full force and virtue.

LEWIS C. ROCKWELL. [SEAL.]
A. S. ROEDER. [SEAL.]

Approved:

CHARLES D. HAYT,
Chief Justice of the Supreme Court of Colorado.

74 Endorsed: — court of the United States, district of Colorado. Alfred S. Ellet, by John A. Ellet, his guardian, pl'ff in error, *vs.* D. F. Campbell, def't in error. Supersedeas bond. $1,000. Filed in supreme court Colo. this 14 day of August, A. D. 1893. James A. Miller, clerk, by —— ——, deputy clerk.

Justification.

THE UNITED STATES OF AMERICA, }
District of Colorado, } *ss:*

A. L. Roeder and —— ——, surety on the within bond, being each first duly sworn, deposes and saith that he is worth in real estate the sum below set opposite his name—that is to say: As to A. L. Roeder, one thousand dollars; as to —— ——, — dollars; as to —— ——, — dollars, over and above all his just debts and liabilities and in property subject to levy and sale upon execution.

A. L. ROEDER.

Subscribed and sworn to before me, at Denver, this fourteenth day of August, A. D. 1893.

My commission expires December 13, 1894.

[SEAL.] ANDREW R. DAVISON,
Notary Public.

* Obtained a writ of error to reverse the judgement of the said court, or having proved and been allowed an appeal from said decree to the — court of the United States.

75 STATE OF COLORADO, *ss:*

In the Supreme Court.

ALFRED S. ELLET, by JOHN A. ELLET, His Guardian, Appellant,
vs.
DAVID F. CAMPBELL, Appellee.

No. 2895. Appeal from District Court of Boulder County.

I, James A. Miller, clerk of the supreme court of the State of Colorado, do hereby certify that the foregoing is a true copy of an original transcript of the record of the district court of Boulder county, State aforesaid, in the above-entitled cause, lately heard and determined by said supreme court upon appeal from the judgment of said district court, together with appellant's assignment of error, the joinder in error of said appellee, and the judgment and opinion of said supreme court and supersedeas bond, as fully as the same appear from the originals thereof now remaining of record in my office, as also the original writ of error, the citation and petition for writ of error and allowance thereof.

Witness my hand and the seal of said supreme court, affixed at my office, in the city of Denver, this fifteenth day of August, A. D. 1893.

[Seal Supreme Court, State of Colorado.]

JAMES A. MILLER,
Clerk Supreme Court of the State of Colorado.

76 In the Supreme Court of the United States.

DAVID F. CAMPBELL, Plaintiff in Error,
vs.
ALFRED S. ELLET, by JOHN A. ELLET, His Guardian, Defendant in Error.

Comes now David F. Campbell, defendant in error, by L. C. Rockwell, his attorney, and says that in the record and proceedings aforesaid and in giving judgment in manner and form as the same is therein given and rendered there is manifest error in this, to wit:

First. The supreme court of the State of Colorado erred in holding and deciding it was unnecessary, under section 2323 of the Revised Statutes of the United States, to mark or stake the surface of the ground in accordance with sections 2320 and 2322 of said statutes or with the laws of the State of Colorado regarding the marking, locating, and recording of claims upon the public domain thereof, and in ordering a final judgment entered in favor of the plaintiff and against defendant. (Folios 109, 110.)

Second. The supreme court of the State of Colorado erred in holding and deciding that lodes discovered in a tunnel need not be marked upon the surface of the ground, under sect. 2323 of the Revised Statutes of the United States. (Folios 150.)

77 Third. The supreme court of Colorado erred in reversing the judgment of the district court of Boulder county, and in ordering a judgment in favor of the plaintiff and against the defendant. (Folios 109, 110.)

Wherefore, for the errors aforesaid, plaintiff in error asks that said judgment be reversed, and that he be restored to all things that he hath lost by reason of the errors aforesaid.

L. C. ROCKWELL,
Attorney for Plaintiff.

78 [Endorsed:] David F. Campbell, pl'ff in error, against Alfred S. Ellet, by John A. Ellet, his guardian, def't in error. Record and assignment of error. L. C. Rockwell, att'y for pl'ff in error, Denver, Colo.

Endorsed on cover: Case No. 15,420. Colorado supreme court. Term No., 283. David F. Campbell, plaintiff in error, *vs.* Alfred S. Ellet, by John A. Ellet, his guardian. Filed October 9th, 1893.

Office Supreme Court U. S.
FILED.
MAR 20 1896
JAMES H. McKENNEY,
CLERK.

167-116

Supreme Court of the United States

OCTOBER TERM, 1895

No. ~~283~~ 441

DAVID F. CAMPBELL, PLAINTIFF IN ERROR,

vs.

ALFRED S. ELLET, BY JOHN A. ELLET, HIS GUARDIAN, DEFENDANT IN ERROR.

Brief and Argument of Plaintiff in Error.

By L. C. ROCKWELL, HIS ATTORNEY.

Supreme Court of the United States

OCTOBER TERM, 1895

No. 283.

DAVID F. CAMPBELL, PLAINTIFF IN ERROR,

vs.

ALFRED S. ELLET, BY JOHN A. ELLET, HIS GUARDIAN, DEFENDANT IN ERROR.

FACTS.

On the 25th day of June, 1888 (p. 5, print), defendant in error Ellet filed his complaint in the District Court of Boulder county, in the state of Colorado, in support of his adverse claim and protest filed in the United States land office in Central City, Colorado, against the application of plaintiff in error (Campbell), for a patent for the J. L. Sanderson lode.

The complaint is something more than an ordinary one filed in such cases under the Code of Civil Procedure for the recovery of specific real property, in that plaintiff claimed title to the Bonanza lode by reason of his ownership of the Corning tunnel in which this Bonanza lode was cut and discovered at the distance of 594 feet in from the face thereof. Therefore, the *pleader* set forth the various steps taken in the location of that *tunnel*, the time when located, and the time and point in the same when and where

this Bonanza lode was discovered, and predicated a title on these several acts performed upon this Corning tunnel.

The defendant below, plaintiff in error here, controverted some of the allegations in the complaint wherein it was alleged that the J. L. Sanderson lode, which was the one the defendant below claimed and was attempting to patent, was discovered on the line of the tunnel (p. 12, print), and denied the validity of the location of the said Bonanza lode, and alleged the same was never staked or otherwise marked on the surface of the ground, and without which acts it could not and did not exist as a validly located claim.

Plaintiff in his replication (p. 15, print), admitted his grantors did not do any work on the surface of the ground in locating this Bonanza lode, by way of sinking a discovery shaft, or posting any notice on the surface of the ground, or by marking or staking the surface boundaries.

The cause was tried before the court upon an agreed statement of facts (p. 16 print), and the findings and judgment were in favor of defendant, the court holding and deciding the title to the J. L. Sanderson was the better one. The plaintiff removed that judgment into the Supreme Court of the State of Colorado for review, and that court reversed the judgment and ordered the District Court of Boulder County to render final judgment in favor of plaintiff below and against the defendant.

To reverse this decision of the Supreme Court of the State, this writ of error is prosecuted.

ARGUMENT.

The agreed statement of facts was so drawn it presented but two questions, which may be stated as follows:

1st. Does the owner of a tunnel located under section 2323 of the Rev. S. of the U. S. by virtue of the location of

tunnel, and working of the same with reasonable diligence, own all lodes cut and discovered by the running of the same, 750 or 1,500 feet each way from its bore, which do not appear on the surface, and which were not known to exist prior to the location of the tunnel, without reference to any other provision of the Act of Congress of May 10, 1872, and with out reference to anystate law regarding the discovery, marking of boundaries and recording of mining claims discovered upon the public domain of the United States?

2nd. Is the parallelogram marked out by the tunnel location sacred ground to the owner thereof, so that no one can go within the same and prospect and exploit the ground for lodes, and if found to one side of the line, or bore of the tunnel, locate and hold the same?

The trial court ruled against each of these propositions, but the Supreme Court of the State ruled in favor of each; and this court is to finally declare the law upon these points.

The following sections of the Rev. Stat. of the U. S. must be read and considered in the decision of this question:

"SECTION 2319. All valuable mineral deposits in lands belonging to the United States, both surveyed and unsurveyed, are hereby declared to be free and open to exploration and purchase, and the lands in which they are found to occupation and purchase, by citizens of the United States and those who have declared their intention to become such, under regulations prescribed by law, and according to the local customs or rules of miners in the several mining districts, so far as the same are applicable and not inconsistent with the laws of the United States."

"SEC. 2320, R. S. U. S. Mining claims upon veins or lodes of quartz or other rocks in place bearing gold, silver, cinnabar, lead, tin, copper, or other valuable deposits, heretofore located, shall be governed as to the length along the vein or lode by the customs, regulations and laws in force at the date of their location. A mining claim located after the tenth day of May, eighteen hundred and seventy-two, whether located by one or more persons, may equal, but shall not exceed, one thousand five hundred feet in length along

the vein or lode; but no location of a mining claim shall be made until the discovery of the vein or lode within the limits of the vein located. No claim shall extend more than three hundred feet on each side of the middle of the vein at the surface, nor shall any claim be regulated by any mining regulation to less than twenty-five feet on each side of the middle of the vein at the surface, except where adverse rights existing on the tenth of May, eighteen hundred and seventy-two, render such limitation necessary. The end lines of each claim shall be parallel to each other."

"SEC. 2322. The locators of all mining locations heretofore made, or which shall be hereafter made, on any mineral vein, lode or ledge, situate on the public domain, their heirs, and assigns, where no adverse claim exists on the tenth day of May, eighteen hundred and seventy-two, so long as they comply with the laws of the United States, and with state, territorial and local regulations not in conflict with the laws of the United States governing their possessory title, shall have the exclusive right of possession and enjoyment of all the surface included within the lines of their locations, and of all veins, lodes and ledges throughout their entire depth, the top or apex of which lies inside of such surface lines extended downward vertically, although such veins, lodes or ledges may so far depart from a perpendicular in their course downward as to extend outside of the vertical side lines of such surface location. * * * "

"SEC. 2323, R. S. U. S. Where a tunnel is run for the development of a vein or lode, or for the discovery of mines, the owners of such tunnel shall have the right of possession of all veins or lodes within three thousand feet from the face of such tunnel, on the line thereof, not previously known to exist, discovered in such tunnel, to the same extent as if discovered from the surface; and locations on the line of such tunnel of veins or lodes not appearing on the surface, made by other parties after the commencement of the tunnel, and while the same is being prosecuted with reasonable diligence, shall be invalid; but failure to prosecute the work on the tunnel for six months shall be considered as abandonment of the right to all undiscovered veins on the line of such tunnel."

"SEC. 2324 The miners of such mining district may make regulations not in conflict with the laws of the United States or with laws of the state or territory in which the district is situated, governing the location, manner of recording, amount of work necessary to hold possession of a mining claim, subject to the following requirements: The location must be distinctly marked on the

ground so that its boundaries can be readily traced. All records of mining claims hereafter made shall contain the name or names of the locators, the date of the location, and such a description of the claim or claims located by reference to some natural object or permanent monument as will identify the claim. * * * "

The following provisions of the Statute of the State of Colorado bear upon this question:

"SEC. 3150, Mill's Ann. Stat. of Colorado: The discoverer of a lode shall, within three months from the date of discovery, record his claim in the office of the recorder of the county in which such lode is situated, by a location certificate which shall contain:

"First—The name of the lode.

"Second—The name of the locator.

"Third—Date of location.

"Fourth—Number of feet in length claimed on each side of the centre of the discovery shaft.

"Fifth—The general course of the lode as near as may be."

"SEC. 3151, M. A. S: Any location certificate of a lode claim which shall not contain the name of the lode, the name of the locator, the date of location, the number of lineal feet claimed on each side of the discovery shaft, the general course of the lode, and such description as shall identify the claim with reasonable certainty, shall be void."

"SEC. 3154, M. A. S: Any open cut, cross-cut or tunnel which shall cut a lode at the depth of ten feet below the surface, shall hold such lode the same as if a discovery shaft were sunk thereon, or an adit of at least ten feet in along the lode from the point where the lode may be in any manner discovered, shall be equivalent to a discovery shaft."

Since this case was decided by the State Supreme Court, the United States Circuit Court of Appeals in case of:

The Enterprise Mining Co. vs. Rico–Aspen Mng. Co. 13th vol. (C. C. A. Ed.), page 390, has decided this question the same way; and which case is, as I understand now in this Court for a review; but with all due respect to those adverse decisions, I submit they are wrong in that they entirely ignore the Federal and State Statutes in regard to staking

and marking the boundary lines of a mining claim on the surface and without surface ground, I claim that no mining location is good under either the Federal or State Statutes. To affirm this judgment, you must hold section 2323 R. S. U. S., which is section 4 of the Act of Congress of May 10th, 1872, regarding the discovery and location of mining claims constitute and embrace a complete mining code by itself.

The Supreme Court in this case, and the Circuit Court of Appeals in the Enterprise-Rico-Aspen Case, were driven to the position that in a tunnel discovery, the discoverer had no right to surface ground, that all he took by reason of the cutting and discovery of a blind lode was so many feet upon that vein without surface rights. Such holding is contrary to the letter and spirit of the Mining Acts of Congress as well as the State Statute upon that subject. It is necessary to have additional ground and space to that embracing the vein of a mining claim, which is generally but a few inches wide. It is true in some places it may be many feet in width, but that condition is an exception, not the rule.

Again they are driven to the position that the blind vein, or lode, which they discovered, cannot be patented, and inasmuch as the Counsel connected with the Enterprise Case are recognized as among the leading mining lawyers of the Western States, I wish to copy from their argument, and I know my opponent has the same document; and if I misquote from it, he can correct me. On page 14 of Appellant's brief in that case is found the following:—"It may well be questioned whether it was the legislative intent that patent should be obtainable for any vein or lode discovered in a tunnel run for the discovery of mines, under section 2323. For it is noticeable that the only right conferred is the *right of possession* of all veins or lodes within three thousand feet from the face of such tunnel on the line thereof, not previously known to exist, discovered in such tunnel to the same extent as if discovered from the surface."

Again, when appellant's counsel came to rely to appellee's argument, they use this language,—page 3, paragraph 2— "The tunnel owner is granted the 'right of possession' of all veins, etc. to the same extent as if discovered from the surface. This 'extent' is fixed by section 2320, which provides that it may equal, but shall not exceed fifteen hundred feet in length *along the vein or lode.* As the tunnel statute does not in itself grant any surface rights upon or adjacent to the vein discovered, but does give the right of possession of the vein to the same extent as if discovered from the surface, this limitation of length 'along the vein or lode' fixed by section 2320, becomes the measure of the right granted by the tunnel law." Counsel's position as stated above is identical with that claimed by my opponent in this case in the courts below, on page 8 of the argument, he says:- "This right of possession is of as great dignity in case of discoveries in a tunnel as it is in case of discoveries and location on the surface. The only difference to be noticed is that section 2322 gives a right of possession to surface ground and to all dips, spurs, and angles included therein, while section 2323 gives a right of possession *to the vein or lode only.* The reason for the difference is obvious. In the first case, surface ground is essential; in the second, it is not. The above quoted language is almost identical with that used by the Supreme Court of the State in this case, 18th Colorado 523, in construing the words: "To the same extent as if discovered from the surface." In our opinion * * * means the same extent 'along the vein or lode'; while the Acts of Congress leave the width of mining claims upon surface subject to regulations within certain limitations the length and depth may not be thus regulated. Court and Counsel treat a tunnel location as a claim. The State Supreme Court in this case, page 521, uses this language: "A tunnel location has been called a tunnel claim by the highest judicial authority."

We find that under a tunnel discovery all surface ground is denied the discoverer. Neither does he have the right to any ancillary lode found within the parallelogram, marked and defined by the boundaries of the claim staked and marked upon the surface, because such tunnel discovery has no boundaries. The right to these ancillary lodes, together with all dips, spurs, and angles, included within the surface locations and of all vein, lodes, and ledges throughout their entire depth, the top or apex of which lies inside of such surface lines, extended downward vertically, although such veins, lodes, or ledges may so depart from a perpendicular in their course downward as to extend outside of the vertical side lines of such surface locations, although these rights are expressly given by section 2323, R. S. U. S., neither can the lodes so discovered in the tunnel be patented, all of these valuable rights are denied to the tunnel discoverer. Then it is not true the owner of such a discovery has all the rights he would have had, had he discovered the same lode on the surface. But the difference does not stop here; under the law of compensation he gains the following rights:-

First:—He need not record nor mark the point of his discovery, nor fix the boundaries of his lode upon the surface, all of which are made absolutely necessary by the Federal and State Statutes in a discovery made by a shaft, an adit, open cut, cross-cut, tunnel, or in any other way except in this enlarged or inflated tunnel, as construed by the State Supreme Court and by the Circuit Court of Appeals.

Secondly:—In running a tunnel, he may strike ten or more separate and distinct lodes. He is relieved from doing any annual labor upon any one of these numerous lodes so cut and discovered, although section 2324 R. S. U. S., reads:- "On each claim located after the tenth day of May, 1872, and until a patent has been issued therefor, not less than one hundred dollars worth of labor shall be peformed, or improvements made during each year * * * and upon a failure

of complying with these conditions, the claim or mine upon which failure occurred shall be opened to relocation in the same manner as if no location of the same had ever been made, provided that the original locators, their heirs, asssign, or legal representatives, have not resumed work upon the claim after forfeiture and before such location.

Third:—Under the decision of the Court of Appeals the discoverer of a lode in a tunnel has the right to take fifteen hundred feet on either side of its bore, that is to say, the first lode cut (supposing the tunnel runs due north and south) he locates fifteen hundred feet to the east; on the next lode cut, he locates fifteen hundred feet west of the bore, and so alternates until he gets to the end of his tunnel location, three thousand feet. He is thereby enabled to monopolize just two hundred acres of the public domain, within which boundaries no person has a right to go and prospect, locate and hold a lode, provided it was previously cut in the tunnel, or it be subsequently found that such lode was cut or discovered in the tunnel, and did not appear upon the surface.

In a location of fifteen hundred feet in length by three hundred feet in width there is a fraction over ten acres, and just ten locations can be made on either side of the bore of the tunnel, in all counties in the state of Colorado except Gilpin, Clear Creek and Boulder, where the width is but 150 feet; therefore where this tunnel is located twenty ordinary lode locations are embraced on one side of this tunnel location. And inasmuch as he can locate the lode on either side of the bore, that number of acres are duplicated, which makes a little over two hundred in each tunnel site, and that ground is held sacred to the tunnel owners. This construction was repudiated by the Supreme Court of Colorado in case of This Tunnel Co. vs. Pell, 4 Colo. 507, upon the ground of public policy, because a very limited number of such locations would cover in most cases an entire mining district, giving to a few tunnel owners all its mines upon the easy con-

dition of prosecuting work therein with reasonable diligence. I wish specially to call your attention to the language used in Reynolds vs. Iron Silver Mining Co. 116 U. S. R. 695, as to the policy of the Government limiting the amount of such public mineral land falling into the hands of a successful explorer to the exclusion of others. This reasoning is potent, unless the express provisions of the act plainly preclude the adoption; while in this case the tunnel owners claimed but seven hundred and fifty feet each way from the center of the claim, under the decision of the Circuit Court of Appeal in the Enterprise-Rico Aspen Case, *supra*, the tunnel owner may take fifteen hundred feet on either side of the bore of his tunnel, which gives two hundred acres of surface land, which is *not public domain*, neither has it been, nor can it be, exploited and appropriated by miners, although it covers numerous mineral bearing veins. The government cannot sell this land, neither can it be appropriated, a most remarkable state of affairs. The present construction of this tunnel section conflicts with nearly all the other provisions of the mining acts, both Federal and State, and leads to confusion and produces an anomylous condition of things.

Here is as appropriate a place as any to state my construction of the act under consideration. It is this: A discoverer locates a tunnel under section 2323, R. S. U. S.; he discovers a lode therein, say one hundred and fifty feet from its face; he then places a notice at the mouth of the tunnel, giving the name of the lode, to-wit, Tunnel lode No. 1, the discovery of which is found one hundred and fifty feet in from the mouth of this tunnel, it having been cut and discovered on March 11, 1896. I claim seven hundred and fifty feet east and a like number of feet west from the center of this tunnel; "A. B." locator of the lode and owner of the tunnel. He then goes upon the surface of the ground, and if the vein in the tunnel appears to be perpendicular or nearly so, he

goes on the line of the bore of the tunnel upon the surface, to a point directly over the place where the lode was cut and discovered in the tunnel, and there erects a notice, saying the discovery of tunnel lode No. 1 is found underneath this point in the tunnel, and it was cut and discovered on March 11, 1896, and I claim seven hundred and fifty feet east and seven hundred and fifty feet west on such lode from center of the tunnel bore; "A. B." locator of the lode and owner of the tunnel. He then erects the monuments upon the surface of the ground, precisely the same as though the discovery shaft had been sunk at the point where he placed the discovery notice. He records his location certificate in accordance with the Federal and State laws. The result: The tunnel owner has marked upon the surface a lode properly discovered, located, and recorded, in accordance with the Federal and State statues, and one in which he may follow the vein upon its dip or pitch into the earth, even though it should pass outside of and under the side lines, and a claim in which he can hold all dips, spurs and ancillary veins under the provisions of 2322, R. S. U. S. and a lode which he may patent under Section 2325, R. S. U. S. and a claim, the possession of which he may defend against in case his neighbor trespasses upon it, either upon the surface or underneath the same.

I treat the running of the tunnel as a means for discovering lodes. Our Supreme Court, as well as the Circuit Court of Appeals, speak about the great expense it would be to make an upraise from the tunnel to the surface before the discovery point is marked on the surface, or the boundary stakes are set. That is idle talk. No one ever claimed such acts to be necessary. The laws of Colorado, Section 3154, *supra*, expressly provide for discovering a lode by means of a tunnel, and no *nisi prius* decision can be found where any court has ruled that an upraise should be made from the tunnel to the surface before the claim can be

staked upon the ground and a record made in the recorder's office.

The chances for error and mistakes are diminished in ascertaining the course and pitch of the lode when you gain such knowledge from a discovery in a tunnel, as compared with such information from a surface discovery, because the lode is generally better defined by walls and by the dip and course of the vein in the tunnel.

In surface discoveries, the strike and course of a lode is a matter largely of conjecture. The discover declares the course and fixes the surface boundaries, but does so at his peril. This court has frequently decided courts do not become locators for the miners; side lines frequently become end lines and *vice versa*.

Flagstaff S. M. Co. vs. Tarbet, 98 T. S. R. 463.

Last Chance Mining Co. vs. Tyler Mining Co. 157 U. S. R. 683.

King vs. Amy and Silversmith Mining Co. 152 U. S. R. 222.

Iron Silver Co. vs. Elgin Co. 118 U. S. R. 186.

No greater uncertainties will arise in marking surface boundaries from tunnel discoveries than from any other, if the lode has a pitch, allow for the same. It is not all important that the apex of the vein be located exactly in the center, between the side lines of the claim.

The place where, and the method by which, a lode is discovered is wholly immaterial, provided it be upon public domain. The law fixes the width as well as the length of the lode by arbitrary figures, but how much ground shall lie on either side of a vein is immaterial, except it cannot be less than twenty-five feet, unless some prior right limits the width to a less number of feet (Section 2320, R. S. U. S). The Colorado Statute, Section 3150, Mills Ann. Stat. directs that the number of feet claimed on each side of the discovery

shaft shall be stated in the certificate of location; but not the width of the claim on either side the discovery shaft.

If there be vacant public domain between the mouth of the tunnel and its breast—by the breast I mean the extreme limit of the excavation made by the bore of the tunnel and its mouth—it is a declaration by the tunnel owner to the public that no vein has been cut or intersected between the face and breast of the tunnel, because no portion of the surface ground has been appropriated; but marking the boundaries upon the surface indicates what lode has been cut in the tunnel, and what its surface boundaries are, and if more than one location has been made upon the surface, and there be vacant ground between those locations, it is a declaration by the tunnel owner to the public that it is public domain, and that no lode has been cut in the tunnel under this unappropriated ground; and any citizen has a right to go there and explore it, and if a vein is found, locate the same as being upon unappropriated public domain.

And the surface ground between the breast of the tunnel and its terminus may be explored and prospected for, lodes and locations may be made thereon; but all such locations depend upon the fact whether or not the vein so discovered from the surface will or will not be cut by the tunnel, if they are cut and discovered therein, and the tunnel owner has a good and valid title to his tunnel at the time they are intersected, he may go upon the surface and survey in the works, shafts, and improvements of the surface discoverer, and make a good and valid location of the lode so cut in the tunnel. Those are the chances which the surface discoverer must take, because he works upon the surface with his eyes open, and he takes his chances that the lode he has discovered upon the surface may not extend to the bore of the tunnel, or if it does, it may not be sufficiently

well defined as a lode as to be preceptible in the tunnel, or the tunnel owner may lose the right to these blind lodes, because he does not work his tunnel with that diligence which the law requires as a condition to hold them; but these chances are like others of the same character in mining, and because they are chances, it does not prohibit men from working and exploring the surface. Neither do they present reason for saying this is not the true construction of the tunnel section.

When the discovery of a lode is made, and a location perfected, the discoverer takes his chances, whether or not his location is made upon public mineral domain and is the first one made upon that vein, and whether or not he has the top or apex of it; and he may have the latter, yet if his neighbor has another top or apex of the same vein, and the two branches are found to unite in their descent into the earth, the man who discovers and locates upon the first branch of the lode has the right to hold it below the point of union, under the Federal and State Statutes.

Section 2336, R. S. U. S. reads: "Where two or more veins unite, the oldest or prior location shall take the vein below the point of union, including all the space of intersection;" and what is true of the ownership of the vein below the point of union, is equally so, by the language of the same section, where veins unite upon their strike or course.

I concede it is correct to say the owner of a tunnel may take fifteen hundred feet upon all veins discovered therein, measuring from either side of the tunnel, but of course, he could not locate more than fifteen hundred feet on the vein by reason of discovering a lode in the tunnel; but he can do this, assuming a tunnel runs north and south, he may take fifteen hundred feet to the east on tunnel lode No. 1, measur-

ing from the west side of the tunnel, and he can excavate ten feet on the vein west of the west side of his tunnel and call it a discovery of tunnel lode No. 2, and then go upon the surface and erect a discovery notice, stating where the discovery of the lode can be found in the tunnel, and fix the boundaries of the claim, and make and record a location certificate, and he will have a validly located claim; and that is precisely what miners will do under the decision of the Circuit Court of Appeals.

We will then have an example of the surface boundaries being marked and location certificate filed upon a tunnel discovery. Then why not say to the owner of a tunnel, he must mark the surface boundaries of the lode which runs east precisely the same as the lode which runs west? And such is the view expressed by counsel in the Enterprise Case on page 7, in their reply to appellee's argument. They say, "Of course, where the tunnel locator locates a mining claim on the discovery of a vein in his tunnel, he may claim surface rights, and, as incident thereto, may claim other veins apexing within the surface of his located claim. And these rights he can protect only by proper adverse of an application of patent for the same territory by another. But such rights are entirely different from the right of possession of a vein discovered in his tunnel; and the latter is given by the tunnel law, and relates back to the date of the tunnel location; the former dates only from the location of the new mining claim, and will be subject to rights at that time accrued to others."

There is no answering that proposition; it is good logic and sound law. But can a Court say it was the intention of Congress to permit the owner of a tunnel claim to take up three thousand feet on a lode by two discoverys made side by side. Under one discovery he must mark the surface boundaries the same as he would if the discovery had been

made from the surface. The other fifteen hundred feet, lying immediately east on the same lode, he holds by a better title without fixing the surface boundaries, or indicating where the discovery is, and without recording the claim. But this inconsistent condition of things disappears if you hold the point of discovery shall be fixed on the surface and the boundaries of the claim staked and marked the same as though the discovery had been made from the surface. And you do not ignore the express provisions of secs. 2320-4 R. S. U. S. and secs. 3150, 3152, 3153-4 M. Ann. St. of the statute law of Colorado. All of which sections expressly command something to be done upon the surface of the ground. As the tunnel section is now construed, all of those sections are wholly ignored.

Under section 2323 R. S. U. S., the Supreme Court of Colorado and the Court of Appeals seem to have ignored the two distinct tunnel right features mentioned in that section which are:—

First:—A tunnel run to develop a vein or lode, and

Secondly:—A tunnel run for the development of mines.

In all lode mining countries, it frequently happens a tunnel is run in and along the vein, and it is found to be by far the cheapest and best way to work that kind of a lode. Can it be possible a man working such a tunnel can have all the enlarged rights and privileges of a tunnel owner, who runs a tunnel for the discovery of mines? Is not the tunnel owner, who works a vein by means of a tunnel, running in and along the lode upon its strike or course, compelled to designate the point of discovery, and fix the surface boundaries and record the lode, the same as though the discovery was made on the surface? Because in that instance, his tunnel could not be longer than his lode, which cannot exceed fifteen hundred linear feet, but within that distance is he entitled to all blind

lodes cut by the tunnel, and not appearing on the surface, the same as the man who runs the tunnel for the discovery of lodes, which runs, as the law presuppose, across the country to cut the lodes lying in its course? Unless the construction given to that tunnel section by the Supreme Court of the state and the Circuit Court of Appeals, will meet all the different conditions and character of rights which may arise under it, their construction must be wrong.

It is easy of demonstration that the man who works a lode by running a tunnel in and along the vein must do everything which the Federal and State Statutes require of a person who makes a discovery from the surface, and works the lode therefrom. Neither does such tunnel owner have these inflated and enlarged rights. The boundaries of his claim are circumscribed by the width of his location, which cannot in any event exceed 600 feet, and fifteen hundred feet in and along said vein; and if it is incumbent on him to perform those various acts, it is equally so upon the other tunnel owner, who runs the tunnel for the discovery of mines.

The phrase, "Where a tunnel is run for the development of a vein or lode," means the working of the same for the purpose of extracting the ore containing the precious metals. It means working it above and beneath the tunnel that is run on the vein. Supposing he made and recorded (instead of the statutory location) a tunnel site location, he would be limited to fifteen hundred feet in length, because that would be the length of his lode, and he would be confined to surface ground seventy-five feet on either side the center of the vein if in Gilpin, Boulder, or Clear Creek counties, in the state of Colorado, and one hundred and fifty feet on either side of the center of the vein in all other counties of Colorado, and three hundred feet in width on either side of

the vein, generally, in the other western mining states and territories. In other words, the width of his surface ground would depend upon the locality of the tunnel; and supposing he did not work the lode through the tunnel with reasonable diligence, he would lose all that portion of it beyond the breast of his tunnel, and it matters not where else he worked upon the lode it would count for nothing upon the question of diligence, because the diligent work spoken of means work in the tunnel and not elsewhere.

The Supreme Court of the state, and especially the Circuit Court of Appeals, in giving the tunnel owner these enlarged rights, do so, as they claim, upon the express provisions of this tunnel section: When its different provisions are analyzed, it is seen at a glance that it cannot receive a literal construction, unless you run into absurdities, inconsistencies and insuperable difficulties.

I will again refer to the Federal Statute, Section 2320, which limits the superficial area of a mining claim to fifteen hundred feet in length by six hundred in width, which makes a trifle over twenty acres. It likewise limits the number of acres to twenty in one claim for placer mining purposes. Reynolds vs. Iron Silver Mining Company, 116 U. S. 687. This shows the policy of the Government to be conservative, and at the same time liberal towards discoverers, and the only reason given by the Supreme Court of the state and the Circuit Court of Appeals for their liberal construction of the tunnel section, is the great expense attached to the running of a tunnel into the bowels of the earth.

I claim that fact is not sufficient to counteract and overcome the declared policy of the Government. What is a tunnel but a horizontal shaft? In all lode mining, you must go into the earth, and whether you reach there through a horizontal tunnel or by shaft, where the rock, dirt and debris must be lifted many hundred feet through a shaft, is wholly immaterial, but the latter method is far more expen-

sive than carrying it out through a tunnel. The court's reasoning upon this point is altogether too weak.

Therefore, I contend that inasmuch as the owner of the Corning tunnel never marked the surface boundary lines of the Bonanza lode, in accordance with section 2320 R. S. U. S. and did not file the location certificate in compliance with section 3151, Mills Annotated Statutes, *supra*, they could not hold the Bonanza lode as against Taylor and Campbell's location on the J. L. Sanderson, even though the Bonanza was the first one cut; and such was the decision of the lower court found at page 20, print.

There are no decided cases directly in point upon the question under discussion, except this and the Enterprise case. It is true that Justice Elliott, speaking for our State Supreme Court, says that the Glacier case, 127 U. S. 471, sustains him in his construction of this tunnel act. I claim that case has not the slightest bearing upon this one. The only question there decided was the sufficiency of the complaint or declaration as to the description of property to resist the effects of a demurrer, wherein it is said that the complaint did not state facts sufficient to constitute cause of action.

The Pell case in 4th Colorado was quite in point, but the court assumed to reason away the force of that decision, and the Circuit Court of Appeals completely upset it, and the decisions from Montana and Idaho cited in Justice Elliott's decision, as well as that in the Circuit Court of Appeals in the Enterprise case, throw but little light upon this question. This case is here for this court to ultimately declare and settle the law as to how lodes are to be located, if at all, and what work shall be done upon the surface in the way of marking the boundaries, if any, upon lodes discovered in a tunnel.

And inasmuch as the Federal statute provides that all lodes discovered may be patented, and inasmuch as you can-

not patent a lode without surface ground, it is indispensible to a validly located claim to have the surface ground marked to segregate it from the balance of the public domain.

Opposing counsel in the court below used this language, page 14 of argument: "We may not now be prepared to ask for a patent; we have a right at any time to so locate our vein by reference to the surface as to enable us to secure one." That position cannot be sustained. They either own that Bonanza lode by virtue of a discovery, or they do not own it. They certainly have no surface ground with it, for they never assumed to take any, and if the Bonanza lode was ever located, it was so the moment it was struck in the tunnel. And inasmuch as our state statute gives but ninety days to the discoverer of a vein to fix the boundaries and record the claim, the owners of the tunnel cannot have years instead of months in which to stake off and locate the surface ground. I need not especially urge the importance of marking the boundaries, because both the Federal and State statutes command those acts to be done; but, to emphasize their importance, I will in conclusion make a single quotation upon that subject. In case of U. S. vs. Castillero, 2 Black, at p. 191, in speaking of the necessity of marking boundaries and fixing definite limits to mining rights, you say: "Boundaries also must be fixed to carry the adjudication into effect, or rather to complete it, else the title or claim, like other indefinite and uncertain interests in lands, will be void for uncertainty. Marking of boundaries, also, is essential under all circumstances, whether the mine is situate in public or in private lands. For if the location is in public lands, compliance with the requirements is essential to show what extent of the public domain has been segregated from the mass of such lands and has passed into private ownership."

There are but three errors assigned (print, 37) which may all be embraced in the statement that the Supreme

Court of the state of Colorado erred in holding and deciding it was unnecessary under Section 2323 of the R. S. of U. S. to mark or stake the surface of the ground in accordance with Sections 2320 and 2322 of the same statute, or with the laws of the state of Colorado regarding the marking, locating and recording of claims upon the public domain of the United States, and in ordering final judgment to be entered in favor of plaintiff below, and against the defendant, for which errors I respectfully ask a reversal of the judgment.

Respectfully submitted.

L. C. ROCKWELL,

Attorney for Plaintiff in Error.

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IN

The Supreme Court

OF THE

United States.

October Term, 1895.

No ~~283~~ 64 64 1

David F. Campbell,
Plaintiff in Error,

vs.

Alfred S. Ellet by John A. Ellet, his guardian,
Defendant in Error.

In Error to the Supreme Court of the State of Colorado.

BRIEF AND ARGUMENT OF DEFENDANT IN ERROR.

PLATT ROGERS,
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C. J. KELLY, Printer, Denver.

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Stated in the briefest possible form the contention of counsel of plaintiff in error is that section 2323, Revised Statutes, United States, merely declares that a discovery of a vein in the tunnel of a

properly located tunnel claim is equal to a discovery on the surface, and that all the methods required by the other provisions of the act of Congress to secure the benefit of a discovery upon the surface are applicable to a discovery in a tunnel. In considering this contention we are at once led to ask: "If such were the intention of Congress, why did it not express itself in appropriate language?" Our mother tongue is not wanting in terms to fit so plain and direct a purpose. But as we shall see, the gentleman is wrong.

Congress had a very palpable object in view when it adopted section 2323. It is our purpose to view that section with reference:

1. To the law prior to its adoption.

2. To the declared purpose of its framers.

3. To the other provisions of the statute of which it is a part.

4. To the obvious import of its terms.

I.

The statute of 1866 declared the mineral lands of the United States open to exploration and purchase. No restrictions were placed upon the methods by which explorations might be conducted, nor were any inducements offered to explore in one way rather than another. A discovery of a vein, either upon the surface or by sinking a shaft through slide and drift, or by running an adit or tunnel, was sufficient to initiate a right to the vein thus discovered. If made by means of a tunnel, a discovery of a vein,

known or unknown, on or off the line of the tunnel or at any distance from the face thereof, was sufficient to invest the discoverer with the right to make a surface location thereon. The prospector was permitted to avail himself of any of the devices of his craft, and if thereby he discovered mineral, the purpose of the statute in that particular was satisfied. Congress did, however, by special act, recognize the desirability of a tunnel in developing the congeries of veins associated with the Comstock lode in Nevada. The act of July 25th, 1866, by which certain rights were given Adolf Sutro in all veins that might be cut in running the Sutro tunnel proved to be of value in the development of the locality affected.

Congress, therefore, entered upon a consideration of the bill, which became the law of 1872, with a knowledge that supplemental legislation was not necessary to confer a license upon the owner of a tunnel to discover veins within his tunnel, nor to vest him with the rights of a surface discoverer in such veins. It knew also that the plan of exploration adopted by the promoters of the Sutro tunnel tended to make known a vast number of veins of which no surface indications existed. It knew because that was the purport of its grant to Adolf Sutro that surface locations of veins discovered in the tunnel were impracticable, and ought not to be required. Upon these matters Congress acted with a full consciousness of the situation.

II.

The license to explore the mineral domain was renewed by the act of 1872, in substantially the same

language as the act of 1866. All methods of discovery were left open to the prospector as before. It was apparently deemed wise, however, to make the principle of the Sutro tunnel act of universal application. It was evident then, as it is now, that to drive a tunnel involves an expenditure far out of proportion to that required in the making of surface discoveries, and that it is also subject to far greater hazard.

Naturally it occurred to Congress to furnish an inducement to undertake such expenditures and to simplify the extent and character of the rights to be secured by such work. The remarks of Mr. Sargent, who had charge of the bill in the House, concerning what is now known as section 2323, throws light upon its meaning, if any were needed. Said he, "Where a man or company starts to run a prospecting tunnel which is a work of great labor and expense, * * * they shall not be deprived of the fruit of their labor by some party who comes in after they have prosecuted their work nearly to completion and locates a lode not known to exist at the time they commenced their enterprise; that is to say, if they discover by their skill and industry and perseverance a lode, they shall be entitled to the benefit of it." He also said in answer to a question by Mr. Maynard: "Where a lode is known to exist, any person may locate it under the mining laws of the United States, but in a case of this kind, where parties run a tunnel and actually discover the lode, this legislation provides that they shall have the right to it." (See Congressional Globe, part 1, Second Session Forty-second Congress, 534.)

As the construction put upon the section by Mr.

Sargent was clearly that which Congress adopted, we may fairly refer to the record for an exposition of its meaning.

> Springer vs. United States, 102 U. S., 586, 596.

While Congress had not, as a general policy, prior to 1872, concerned itself with special methods of exploration, it now suggested the advisability of prospecting by means of tunnels. To all intents and purposes it provided for a new class of claims, to-wit, tunnel mining claims or "tunnel sites" as they are popularly called. The reward given to a tunnel owner for his courage and investment seems to us singularly appropriate. It was not proper that veins capable of being discovered from the surface should be withdrawn from those whose means would only permit surface discoveries, nor was it proper to give to the tunnel owner veins not discovered through the tunnel. If these two elements are kept in view it will be seen that the adjustment between those prospecting by tunnels and those prospecting on the surface was statesmanlike and considerate. To the tunnel owner it said: "All veins discoverable above the tunnel you cannot have; all veins not discoverable in the tunnel you cannot have;" or stated in another form, the tunnel owner was given what he could discover beneath the surface, provided no one else could discover it on the surface.

A favorite argument of those opposed to our construction of section 2323, and it is also used by opposing counsel, is that it tends to monopolize large tracts of the mineral domain. To make this contention the more plausible, "the horrible example"

brought forth at pages 9 and 10 of counsel's brief is always presented: "Over 200 acres or the equivalent of twenty surface locations are sacred to the tunnel owner,' says counsel.

The statement bristles with inaccuracies. The statute produces no such result. At page 14 he says: "I consider it correct to say the owner of a tunnel may take 1,500 feet upon all veins discovered therein measuring from either side of the tunnel." The statute, however, makes no such confession. There is not a shadow of authority for saying that the tunnel owner may do anything of the kind. He is given a length along the vein "to the same extent as if discovered from the surface," meaning thereby 1,500 feet. As he is neither required or authorized to locate any claim upon the vein unless he chooses to do it independent of his tunnel right and make an actual location on the surface, the vein comes to him as an incident to his tunnel by virtue of section 2323, and not by virtue of any location, and it is not permitted him to say he will take as many feet as he desires on one side and the remainder on the other. Congress contented itself with saying that a tunnel owner should have 1,500 feet on a certain class of veins discovered in the tunnel. There it stops. If the act is good for anything it is self-operative. When a vein is discovered the owner gets it with a distribution of its length as between the two sides of the tunnel conformably to the intention of Congress and not by virtue of any act of his own. In the absence of any expression to the contrary it must be held that Congress intended that a tunnel should be the center of the length given on the vein,

that is, 750 feet of the vein should be on either side of the tunnel or point of discovery.

Erhardt vs. Boaro, 113 U. S., 527.

We have thus cut this would be domain "held sacred to tunnel owners" in half.

Again, it is assumed, to support the argument of monopoly, that all veins within a parallelogram of 3,000 by 1,500 feet run at right angles to the tunnel. Such is rarely, if ever, entirely the case. Besides this, known veins, and all dips, spurs, variations and angles of unknown veins within the territory, unless also cut in the tunnel, are open to location by others. Nothing is "sacred," except the unknown veins discoverable in the tunnel. The sum and substance of the matter is that no greater monopoly is countenanced by section 2323 than would exist if an exclusive right were given to all veins discovered within a given area at the bottom of the sea.

If it were possible to give a monopolistic direction to that section, it would require the construction contended for by counsel. He would have every vein discovered in the tunnel located on the surface. If that were done, known veins, as well as unknown ones, would be located, and not only would the tunnel owner secure the veins cut or discovered, but he would also, by virtue of his location, acquire all their dips, spurs, variations and angles. And all this, if you please, by covering the surface of the earth above the tunnel with theoretical locations. Add to this his contention, already noticed, that you may locate 1,500 feet on either side of the tunnel, and the monopoly nightmare would dissolve into a daylight reality.

III.

The other provisions of the act of 1872, as already noticed, do not enter into any consideration of the ways and means of making discoveries. After declaring the mineral deposits in public lands open to exploration and purchase, and the lands in which they are found to occupation and purchase, the act proceeds at once, by section 2322, to declare the rights of locators; that is, of those who, in compliance with local laws, customs and statutes, have (1) discovered a vein or lode, and (2) have segregated it by staking, etc., from the public domain. This section contemplates the ordinary discovery, however it may be made, where surface ground is an essential element in making the location. It gives to the locator "the exclusive right of possession and enjoyment of all the surface included within his location, and of all veins, lodes and ledges, etc." It then proceeds, by section 2323, to state the condition upon which the tunnel owner shall have the same "right of possession" of veins or lodes discovered by him in the tunnel as is given to the surface locator by section 2322. It is evident that Congress intended to approach the subject in two ways. (1) By the discovery of a vein on the surface and the location of the claim. (2) By the location and running of tunnels, and the underground discovery of veins. We say this, because the conditions upon which a "right of possession" is given are stated in two forms. By section 2322, "The locators of all mining locations * * * shall have the *exclusive right of possession* and enjoyment of all the surface and of all veins, etc., included within the lines of their location." By sec-

tion 2323, "The owners of a tunnel, run for the discovery of mines, shall have the *right of possession* of all veins or lodes * * * discovered in such tunnel, to the same extent as if discovered on the surface." The "right of possession," as used by Congress, defines the legal status of the owner of a surface location, and of a tunnel claim respectively, and places them upon the same legal footing. In both cases, the conditions as to discovery and location are substantially the same, the only difference being that in the case of surface claims the discovery precedes the location, while in case of tunnel claims the location precedes the discovery. There is a significant difference in the thing granted. By section 2322, possession is given of all dips, spurs and angles included within the territory located, while, by section 2323, the right is limited to the vein or lode actually cut by the tunnel.

IV.

The language of section 2323 indicates that Congress intended to invest a tunnel owner with rights *sui generis*. Instead of simply stating, as would undoubtedly have been done, if such were the intention, that if one should discover a vein or lode in running a tunnel, he might locate the same within the time and in the manner provided in other cases; it sets out various restrictions and limitations upon the extent to which a tunnel owner may claim veins cut in the tunnel. In view of the legislation of 1866, and of the privilege thereby conceded to discover veins by means of tunnels, and to locate the same, as in case of surface discoveries, it is apparent that

if the contention of counsel is right, the owner of a tunnel, instead of receiving encouragement, has been placed in a far worse position than he was prior to the adoption of the act of 1872. In our view, the limitations imposed by section 2323 mark the boundaries of the tunnel owner's rights to veins cut in the tunnel, as incidents or appurtenances to the tunnel. It is fallacious to say that, upon the restricted number of veins given to the tunnel owner, he is required to make surface locations, since the making of such locations would serve to detach the vein located from the tunnel, and give to it its own independent standing. If the veins discovered must be located, the tunnel as a mining claim becomes a nullity. It is true that the act does not in terms speak of tunnel claims, nor provide any method of locating the same. It would, however, be ineffective if it were not considered as doing so in effect. The contemporaneous construction of the Interior Department shows that Congress considered tunnels run under the act, as in the nature of mining claims, and expected that the proper department of the government would provide the necessary regulations for the establishment and maintenance of such claims. See general circular instructions of April 1st, 1879, sections 20 to 26. The Courts have also considered tunnels as mining claims, and entitled to protection as such.

Back vs. Sierra Nevada Con. Mining Co., 17 Pac., 83.

Glacier Mining Co. vs. Willis, 127 U. S., 471.

We conceive the true situation to be this. The placing of stakes along the line of the proposed tunnel, properly marked, gives precisely the same information for 3,000 feet that the staking of a lode

location gives for 1,500. When a tunnel mining claim or tunnel site is thus established, discoveries of unknown lodes thereafter, made in running the tunnel, attach themselves to the such claims or sites, and the right of the tunnel owner to the same is dependent upon the tunnel and not upon a separate surface location. Two expressions in section 2323 induce the conclusion that locations on the surface were never intended of lodes, discovered in the tunnel. First—In limiting the right of tunnel owners to "lodes not previously known to exist," it could not have been expected that lodes not appearing upon the surface were capable of surface location. Second—If the same conditions obtained in the case of discoveries in the tunnel, as in case of discoveries on the surface, it was entirely unnecessary to specify the extent of the right of the tunnel owner along the length of the vein. He would very properly have been referred to the provisions of the act concerning locations. But Congress did not so view it. When the bill was originally introduced, it read as follows: "When a tunnel is run * * * for the discovery of mines, the owners of such tunnel shall have the right of possession * * * to the extent of 500 feet on each side of the tunnel." If this language had remained, it would have been apparent that Congress meant to differentiate between veins discovered on the surface and veins discovered in the tunnel, and that the distinction was made to relieve the tunnel owner of the obligations imposed upon surface discoverers.

The bill, however, was amended by enlarging the length given on a vein to 1,500 feet, but this could not be said to in anywise change the logic. The fixing of the length, in case of underground discoveries,

was in effect a declaration that such veins stood on their own footing, and no aid was to be sought from the other provisions of the act.

Section 2323 was introduced by a member possessing practical mining experience. The language used indicates a thorough knowledge of the localities in which mineral deposits occur as well as of the physical characteristics of fissures, crevices and veins. "Veins or lodes not known previously to exist" are, in mining vernacular, "blind lodes," whose presence is concealed by the heavy drift or slide of the country or by the broken and rugged faces of the mountains. To one familiar with the mining regions, "blind lodes" suggest a deep, precipitous slide or an almost inaccessible rocky slope where it would not only be expensive but dangerous to run drifts or adits in prospecting for veins. It is true that blind lodes also occur in localities whose topography is quite dissimilar to those noticed, and where it might be said that the intent of the statute did not apply. Such, for example, is the case in the Cripple Creek District, in which, while the smooth and gently rounded hills offer the most favorable conditions for surface working, the veins are concealed by a heavy cap of tuff and breccia. But in this district tunneling is not a favorite method of exploration, it being far easier and less expensive to search for mineral from the surface. It, therefore, remains true that tunnels for discovery are best adapted to localities offering but indifferent opportunities for surface prospecting. If the Court will consult any easily accessible print or photograph of a mining tunnel showing the hill or mountain into which the tunnel is run, the observations we have made will be appreciated.

The author of the bill also well knew that whatever might be the character of the superincumbent country, whether smooth or broken, it would be practically impossible in the case of a vein cut at any distance from the face of the tunnel to make a location on the surface. Both in their strike and dip, veins are capricious and uncertain. A given angle of dip at the point of intersection in the tunnel would be far from suggesting that it would hold good to the surface. If it did so continue the probabilities are that it would be a barren vein not worth a surface location. It is generally understood that a fracture that in dip and strike represents the shortest line between two points, represents nothing else. Its smooth, regular walls have permitted the escape of the valuable filling requisite to justify working. Numerous flexures and folds, while they bewilder and tantalize, served to retain the valuable deposit. It is folly to suppose that the apex of a vein discovered in a tunnel will be found at a given point on the surface in response to any geometrical calculation.

These observations are in no sense dependent upon technical knowledge. They merely speak the every day experience of those familiar with mining operations and are well within the knowledge of opposing counsel. There is no reason why the discoverer of a lode in a tunnel should mark or record the point of his discovery, nor fix the boundaries on the surface. While as a matter of precaution the Bonanza lode was made the subject of an attempted location by the then owners of the Corning tunnel, we do not consider that it in any sense strengthened the right of possession thereto. A location made in

accordance with theoretical geometry, as suggested by counsel, would not advise nor would its absence deceive. The placing of stakes upon the surface, to mark the location of a vein encountered hundreds of feet below, might introduce humor into mining, but would accomplish nothing else. If not on the vein, with the same accuracy that is required in case of actual surface discovery, it would avail nothing, and if a patent is the necessary object of every discovery and location, it is doubtful whether, in the absence of proof that the vein had actually been disclosed at the surface, a patent could properly issue. Suppose a location, made in due form by another in conflict with such theoretical location, and patent applied for. What could the tunnel owner do to save his theoretical location, save to rise to the surface and establish the continuity of the vein discovered in the tunnel, and its proper position within the lines of his location. The suggestion that the act in question contemplates a location of a vein at the point where "you guess" the apex may be found, hardly comports with the presumed intelligence of Congress.

While we insist that the languge of the act leads to no other conclusion than that which we have drawn, we are also clear that the motive to its adoption would fail of realization if the claims of opposing counsel were valid.

It is the province of this Court to finally construe the act. What its judgment shall be must be determined by its own standards, but we respectfully submit that all opinions heretofore expressed by the intermediate Courts have held to our view of the case.

Pelican-Dives Mining Co. vs. Snodgrass, 9 Colo., 204.

Hope Mining Co. vs. Brown, 19 Pac., 220; 28 Pac., 732.

Back vs. Sierra Nevada Cons. Mining Co., 17 Pac., 83.

Enterprise Mining Co. vs. Rico-Aspen Mining Co., 66 Fed., 200.

The opinion of the Supreme Court of Colorado, now under review, was rendered after the question had been twice argued, and it is the careful judgment of men as familiar with the subject of the act as was the author of the bill.

With due deference to the opinions of other Courts, we believe it to be the clearest and most logical exposition of the act yet given, and nothing said by opposing counsel tends in the slightest degree to weaken its force.

An intelligent application of an act may always be expected from those familiar with the subject with which it deals.

There can be no doubt, therefore, about the value of the opinion expressed by the Court below. Its clear comprehension of the situation cannot safely be ignored.

Respectfully submitted,

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JOHN F. SHAFROTH,

Attorneys for Defendant in Error.